87-1935

Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1987

GIROLAMO VITO PALAZZOLO,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I.

IS THE CONCEPT OR STANDARD OF PROBABLE CAUSE, WITHIN 18 U.S.C. §2518, AS SET FORTH IN THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, A MATTER OF STATUTORY LAW EMBODYING THE AGUILAR RULE AND REFLECTING THE EXISTING LAW AT THE TIME, OR IS THE STANDARD OF PROBABLE CAUSE GOVERNED BY THE TEST DEVELOPED IN ILLINOIS V. GATES?

II.

DOES THE CONTINUED AFFIRMANCE BY THE FEDERAL CIRCUIT COURTS OF THE USE OF BOILERPLATE LANGUAGE TO FULFILL THE NECESSITY REQUIREMENT UNDER 18 U.S.C. §2518(1)(c) CONFLICT WITH THE INTENT OF CONGRESS AND THE IMPORT OF UNITED STATES V. KAHN, 415 U.S. 143 (1974)?

## LIST OF PARTIES

The parties in this proceeding in the United States Sixth Circuit Court of Appeals were as follows:

1. GIROLAMO VITO PALAZZOLO -- Defendant-Appellee.

2. SALVATORE EVOLA -- Defendant-Appellee.

3. UNITED STATES OF AMERICA -- Plaintiff-Appellant.

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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

GIROLAMO VITO PALAZZOLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

The Petitioner, Girolamo Vito Palazzolo, by his attorney, Richard Paul Zipser, prays that a Writ of Certiorari issue to review the Judgment heretofore entered by way of Opinion against him by the United States Court of Appeals for the Sixth Circuit filed on January 29, 1988 and further denied by Petition for Rehearing En Banc on March 24, 1988.

## OPINIONS AND ORDERS BELOW

On September 13, 1985, the Honorable Ralph Freeman, United States District Court Judge issued a Memorandum Opinion. The Opinion is unreported, but it is a written Opinion of the United States District Court of Michigan, Southern Division, by the Honorable Ralph Freeman and it's relevant content is set out in Appendix A. The Opinion suppressed a Co-Defendant Evola wiretap for lack of probable cause and insufficient showing regarding "other investigative procedures". The Opinion also suppressed the initial wiretap of the Petitioner Girolamo Vito Palazzolo and wiretap extensions of both the Co-Defendant-Petitioner Evola and the Petitioner Girolamo Vito Palazzolo. The Opinion of the United States Court of Appeals for the Sixth Circuit is recommended for full text publication and is reported and is set forth in Appendix B

herein. The Order denying Petitioner's Motion for a Rehearing En Banc is set forth in Appendix C herein.

## JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on January 29, 1988. An Order denying a Petition for Rehearing En Banc was entered on March 24, 1988 by the United States Court of Appeals for the Sixth Circuit. The time for filing a Petition for Writ of Certiorari continues until May 23, 1988. The jurisdiction of the Court is invoked under Title 28, U.S.C. §1254(1).

The Petitioner calls attention with regard to jurisdiction that there has not been a full trial of the Petitioner in this matter. He has yet to come to trial. The matter proceeded to the Court of Appeals for the Sixth Circuit pursuant to 18 U.S.C. §3731. The Plaintiff-Appellant, the United

States of America, proceeded by right of interlocutory appeal by the Government in a criminal case from a Pretrial suppression of evidence. 18 U.S.C. §3731 provides that an appeal by the United States shall lie to a Court of Appeals from a decision or order of a District Court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the Defendant has been put in jeopardy and before the verdict or finding on an Indictment or Information, if the United States Attorney certifies to the District Court that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of a fact material in the proceedings.

The Petitioner points out that he is unaware of an co-existing rule with regard to a Defendant in a criminal case being allowed to appeal a denial of suppression until a

final trial and judgment. The Petitioner therefore informs this Honorable Court that with regard to jurisdiction, by way of Writ of Certiorari, that said Writ is filed pursuant to being timely, but acknowledges that Petitioner is uncertain as to whether or not a Writ of Certiorari is viable as to the issue put before the Court with regard to the Opinion of the Sixth Circuit, as it came to the Sixth Circuit by way of the Government's interlocutory appeal. If it is held that jurisdiction does not lie, it is requested that this Honorable Supreme Court issue such finding that such Petition would not be timely until a full trial has been had by the Petitioner. The Government was asked to concur in this position at the trial court conference held in April of 1988 and indicated it could not concur and therefore, this Writ of Certiorari has been filed to protect the right of the Petitioner.

## STATEMENT OF THE CASE

On April 30, 1984, a special grand jury in the Eastern District of Michigan returned a three count indictment. Indicted were Pietro Alfano of Oregon, Illinois, Salvatore Evola, Girolamo Vito Palazzolo, and Girolamo Vitale. The four Defendants were charged with conspiracy to distribute cocaine, 21 U.S.C. §841(a)(1). In addition, a second count charged Co-Defendant Evola and a third count charged Co-Defendant Vitale with possession with intent to distribute cocaine, pursuant to 21 U.S.C. §841(a)(1).

The Michigan Indictment was based almost entirely upon the fruits of Court authorized electronic surveillance. As to the Eastern District of Michigan, the first ordered surveillance by the Federal District Court was February 3, 1984 on the residence of Salvatore Evola, a Co-Defendant of the Petitioner. On March 1, 1984, Court

authorization was obtained for the residence and business telephone of the Petitioner Girolamo Vito Palazzolo. On March 3, 1984, there was an extension of the Co-Defendant Evola's wiretap and on March 31, 1984, an extension was issued as to the Petitioner Girolamo Vito Palazzolo's telephones, namely his residence telephone and business telephone.

While there were other interceptions in the Northern District of Illinois and the Western District of Wisconsin by Court order as to the Co-Defendant Evola, the determinations made by the Memorandum Decision of Judge Freeman in suppressing the evidence is largely derivative of determinations made as to the original Eastern District of Michigan wiretap of February 3, 1984 of Co-Defendant Salvatore Evola. It is understood that the Co-Defendant Evola is simultaneously filing a

similar Petition for Writ of Certiorari as presented in the instant matter. The Michigan wiretap requests incorporated by reference a 401 page cumulative affidavit of a Special Agent of the New York office of the F.B.I. and the second consisted of a 40 page affidavit of another agent entitled Affidavit in Support of Order Authorizing the Continued Interception of Oral and Wire Communications. When Certiorari is granted to Petitioner, Supreme Court Rule 30 would provide for Petitioner and Respondent to prepare, if needed, the enormous and outsized document.

On September 13, 1985, Judge Freeman issued a Memorandum Opinion which essentially suppressed the initial Evola wiretap for lack of probable cause and insufficient showing regarding other investigative procedures. The order further suppressed the Petitioner Girolamo Vito Palazzolo's wiretap, the Evola and Girolamo Vito Palazzolo extensions, and

the Evola search warrant as derivative of the initial Evola wiretap. The Court upheld a related Alfano wiretap and extension. In accordance with the Memorandum Opinion of Judge Freeman, an order was issued on October 10, 1985 denying Co-Defendant Vitale's motion to suppress the Alfano wiretaps. On October 21, 1985, in separate orders, the Court granted the suppression motions of Defendants Evola and Palazzolo.

The Government appealed by way of interlocutory appeal taken pursuant to it's statutory right under 18 U.S.C. §3731 regarding the suppression order entered by the Honorable Ralph M. Freeman, Senior Judge of the Eastern District of Michigan.

In his Memorandum Opinion of September 13, 1985, the District Judge suppressed the initial Evola wiretap based on a lack of probable cause and an insufficient showing regarding other investigative procedures.

In addressing the Petitioner Girolamo Vito Palazzolo's matters, the District Judge ruled that there was no probable cause to support an order of interception of the Defendant Evola's telephone on February 3, 1984. Accordingly, evidence derived from such interception is an extension of the Evola wiretap, including evidence obtained as a result of conversations overheard between Evola and the Petitioner Palazzolo and they must be suppressed. The Opinion of Judge Freeman went on to address the suppression of evidence derived from an electronic surveillance of Petitioner Palazzolo's home telephone in Sterling Heights, Michigan and his place of business in the Romeo Car Wash. The Opinion of Judge Freeman found that the affidavit submitted in support of the application of wiretaps and extensions thereof of the Petitioner Girolamo Vito Palazzolo's two telephones, were as a result

of information obtained in an illegal surveillance of the Co-Defendant Evola's telephone and essential, in fact of the granting order of interception of Girolamo Vito Palazzolo's telephones.

The Court specifically decided that given the complicated and interrelated nature of the individuals in this alleged narcotics trafficking scheme and the reliance upon such illegally obtained evidence, the Court concluded that the connection can not become so attenuated as to dissipate the underlying taint from the original Evola tap. Accordingly, as stated, the District Court suppressed evidence derived from the electronic surveillance of Palazzolo's home telephone and his business telephone.

On January 29, 1988, the United States Court of Appeals for the Sixth Circuit reversed the decision of District Judge Freeman. This was before the Court of

Appeals pursuant to the interlocutory appeal on the issues taken by the Government. As the Court of Appeals noted, a very large part of the evidence that would be submitted at the trials of Co-Defendant Evola and Petitioner Girolamo Vito Palazzolo consisted of materials derived from sources growing out of the suppressed wiretap. The Sixth Circuit Panel held that the warrant issued carefully complied with the requirements of 18 U.S.C. §2518 et seq. as to the electronic eavesdropping. The Sixth Circuit concluded that there was sufficient probable cause and a needs requirement and that the District Court suppression ruling on these grounds should be reversed.

A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Sixth Circuit.

## REASONS FOR ALLOWANCE OF THE WRIT

### I.

THE CONCEPT OR STANDARD OF PROBABLE CAUSE, WITHIN 18 U.S.C. §2518, AS SET FORTH IN THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, IS A MATTER OF STATUTORY LAW, EMBODYING THE AGUILAR RULE AND REFLECTING THE EXISTING LAW AT THE TIME, ESPECIALLY AS IT RELATES TO THE TEST OF PROBABLE CAUSE UNDER THE STATUTE. CONGRESS HAS NOT CHANGED THIS UNDER THE STATUTE. UNTIL CONGRESS SO CHANGES IT, IT FOLLOWS THAT IT SHOULD REMAIN THE LAW. THE QUESTION OF PROBABLE CAUSE AND THE REFLECTING TEST UNDER THE WIRETAP STATUTE IS AN IMPORTANT QUESTION AND ONE THIS HONORABLE SUPREME COURT MUST CONSIDER, AS THE CIRCUIT COURT AS IN THE INSTANT MATTER, UTILIZES A "TOTALITY OF THE CIRCUMSTANCES" STANDARD PER ILLINOIS V. GATES, 462 U.S. 213 (1983).

The utilization of an erroneous standard is a substantial question with regard to statutory probable cause, federal questions, and Constitutional interpretation that calls for the Court to render a decision that the

use of the "totality of the circumstances" standard is contrary to Congressional intent, statutory enactment, as the appropriate test is embodied in Aguilar v. Texas, 378 U.S. 108 (1964). The Court of Appeals used the improper standard in determining that it would reverse the District Judge. In granting the Petitioner's Writ of Certiorari, this Court would render an important decision on a matter of law yet to have been ruled upon by the United States Supreme Court.

The Sixth Circuit at first seemed to recognize the uniqueness of the wiretap statute. Their Opinion reflects that basic standards for a wiretap are similar to those for a search warrant, but there also must be strict compliance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520 (App. B). If the Sixth Circuit erroneously construed that there was no specific formula that must be

met for a warrant and that the evidence must be judged on the totality of the circumstances and in a reasonable and common sense manner relying on Illinois v. Gates, 462 U.S. 213, 238 (1983). There is no question that the Sixth Circuit relied upon this standard in deciding to reverse the District Court's Opinion as to whether there was probable cause to believe that evidence of a crime would be uncovered.

The District Court did not err in determining that there was insufficient probable cause to support to initial court authorization of the electronic surveillance on Co-Defendant Evola. Moreover, the Sixth Circuit used an erroneous standard. A Supreme Court ruling is needed in order to determine the appropriate standard with regard to probable cause under the wiretap statute.

The Petitioner, Girolamo Vito Palazzolo, had interceptions on Evola's telephone line suppressed and interceptions on Petitioner's telephone taps suppressed, as a result essentially of the illegality of the initial Evola wiretap for lack of probable cause and an insufficient showing regarding other investigative procedures. Petitioner benefited from the District Court's ruling, as the District Court held, that the interceptions of Girolamo Vito Palazzolo and interceptions on Petitioner's wiretaps were obtained as derivative of the initial Evola wiretap. The District Court held that the connection of the Petitioner and his wiretaps had not become so attenuated as to dissipate the underlying taint of the Evola tap.

Petitioner's motion to suppress with respect to evidence derived from the Petitioner's home telephone and business telephone is appropriate. There was not a

means sufficiently distinguishable to be purged of the primary taint from the original Evola wiretap that served as a basis for the application and court ordered approval of the wiretap on Petitioner's telephones.

Petitioner was an aggrieved person under 18 U.S.C. §2518(10)(a). Further, under 18 U.S.C. §2510(11), an "aggrieved person" is any person who was a party to an intercepted wire or oral communication or a person against whom the interception was directed. The lack of probable cause as to the Evola wiretap wherein Petitioner Palazzolo was intercepted, gave Petitioner, pursuant to statute and case law, the standing and the right to suppression of the contents of Evola's tap as it applies to Petitioner Palazzolo. United States v. Abascal, 564 F.2d 821 (9th Cir. 1977); United States v. Alderman, 394 U.S. 165 (1969). Further, United States v. Wac, 498 F.2d 1227 (6th Cir.

1974), held that no evidence derived from an illegal wiretap may be received into evidence in any trial, hearing or other proceeding or before any court. See also, Narvone v. United States, 308 U.S. 338 (1939); Wong Sun v. United States, 371 U.S. 471 (1963). It was well reasoned that a second wiretap containing information obtained as a result of a judicially condemned first wiretap order should be struck down as the second wiretap and suppressed evidence were obtained as a result of the first wiretap.

In obtaining a suppression, the Co-Defendant Evola before the District Court, relied on United States v. Algie, 721 F.2d 1039 (6th Cir. 1983). The standard of review by the District Court at the time of determining whether or not there was sufficient probable cause, was argued by the Co-Defendant as one that should be determined pursuant to the statutory scheme under the

wiretap statute. Evola's counsel showed to the trial court that in fact all the government had with respect to it's application for a wiretap against Evola was essentially telephone toll records. The lower court found the argument to have merit. The trial court was correct when it interpreted that the only specific items relating to Evola in the Information presented for an order to wiretap were certain toll records. The probability of the requirements for probable cause had not been met and the Sixth Circuit should have followed as did the District Judge, the dictates of United States v. Algie, supra.

The concept of probable cause within the wiretap statute is of course governed by standards developed in traditional arrests, search and seizure practice prior to the statute's enactment in 1968. See e.g., United States v. Hyde, 574 F.2d 856, 862 (5th

Cir. 1978). As such, the teachings of Aguilar v. Texas, 378 U.S. 108 (1964) and it's progeny Spinelli v. United States, 393 U.S. 410 (1969) apply. In 1968, Congress embodied the Aguilar rule in Title III as a matter of statutory law. S. Rep. No. 1097, 9th Cong., 1st Sess., 100-102 (1969). Until Congress changes it, it should remain a reflection of the existing law as to the Aguilar rule. See, Helvering v. Griffith, 318 U.S. 371, 394-95 (1943). The Tenth Circuit had reserved decision on this issue. United States v. Newman, 733 F.2d 1395, 1399 (10th Cir. 1984). Other Circuits, as appears the Sixth Circuit, have assumed uncritically that Gates controls Title III statutory concept of probable cause. See, United States v. Domme, 753 F.2d 950, 953-54 (11th Cir. 1985). Connecticut, on the other hand, has correctly interpreted it's own version of Title III to reflect the incorporation of the

then-current case law into it's statute. State v. Ross, 194 Conn. 447, 455; 481 A.2d 730, 738 (1984). The decision incorporated the Aguilar-Spinelli analysis into it's State statute.

The Petitioner respectfully prays that there is substantial reason for the granting and allowance of this Writ of Certiorari, and further, that the decision of the District Judge was correct, the Sixth Circuit erroneous in it's reversal and that this Honorable Court reverse the Sixth Circuit and affirm the District Court. Alternatively, that the Court remand the matter to the Sixth Circuit for a determination pursuant to the appropriate test for probable cause under the wiretap statute.

## II.

## THE CONTINUED AFFIRMANCE BY THE FEDERAL CIRCUIT COURTS OF THE USE OF BOILERPLATE LANGUAGE TO FULFILL THE

NECESSITY REQUIREMENT UNDER 18 U.S.C. §2518(1)(c) CONFLICTS WITH THE INTENT OF CONGRESS AND THE IMPORT OF UNITED STATES V. KAHN, 415 U.S. 143, 153 n.12 (1974).

An important question of federal law is raised that requires the granting of the Petitioner's Writ of Certiorari. The District Judge's Opinion was correct, when it determined that there was an insufficient showing regarding other investigative procedures that are required under the wiretap statute. There was insufficient support for the initial authorization of electronic surveillance on the Co-Defendant Evola's residence telephone as to the "needs" requirement. The Sixth Circuit, in reversing the District Court's decision on this question, acknowledged United States v. Kahn, 415 U.S. 143, 153 n.12 (1974). Section 2518(1)(c) requires an application for a wiretap to include a full and complete

statement as to whether or not other investigative procedures have been tried and failed, or why they reasonable appear to be unlikely to succeed if tried. This section is rooted in the Constitutional mandate that "exigent circumstances" must be shown before a technique of surreptitious invasion of privacy may be employed. Berger v. New York, 388 U.S. 41, 60 (1967). Katz v. United States, 389 U.S. 347, 355 (1967).

Justice White noted in Giordano, 416 U.S. at 515:

> Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evidence the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed....

See also, Dalia v. United States, 441 U.S. 238, 250 (1979), wherein it was held that a genuine need for it and only to the extent that it be needed must be established. See also, Kahn, supra, 415 U.S. at 153 n.12 "necessity [must be] shown"; 115 Cong. Rec. 23, 240 (1969)(a tool of last resort)(the statement of Senator John L. McClellan).

In the instant matter, the District Court was seeking to enforce a vital prerequisite to the use of electronic surveillance that should be strictly enforced. In United States v. Spagnuolo, 549 F.2d 705, 709-11 (9th Cir. 1977), the Ninth Circuit promulgated an appropriate standard for testing applications under §2518(1)(c). In the instant matter, the standard was not met. The Sixth Circuit accepted the boilerplate language that the District Court refused to accept. The command of the Constitution and the will of Congress had

been violated with the acquiescence by the Sixth Circuit in the instant matter. In the instant matter, with regard to needs, Co-Defendant Evola had argued the Government did no evaluation of relationships in terms of normal business between the various parties that were intercepted. There was no surveillance done for approximately six months on Evola.

While each of the applications recited language required by Section 2518(1)(c), there was only generalized statements as reasons for need. These were boilerplate assertions that could have been lifted out of thousands of wiretap applications. Yet, they were generalized statements and they failed to provide any factual basis for the Government's request. An example of such boilerplate language was "(1) informants are non-existent or are unable/unwilling to provide information. They are either unable

or unwilling to produce more specific concrete evidence which would be acted upon by your affiant; (2) no other investigative technique will give a complete picture of the full nature and scope of the conspiracy; (3) due to the close knit nature of this conspiracy". The above three pieces of boilerplate language are not reliable information. If informants do not exist, then of course they would be unable and unwilling. This is agent talk. It is not information upon which a court should rely. The District Court was correct in it's finding. The Sixth Circuit Opinion does a disservice to this statute and the Constitution as to the "needs" requirement. The decision was also contrary to United States v. Landmesser, 553 F.2d 17, 20 (6th Cir. 1977)(quoting United States v. Giordano).

A granting of this Petition for Writ of Certiorari is prayed for.

CONCLUSION:

For reasons stated, Petitioner respectfully urges that the Petition for Writ of Certiorari be granted. In the alternative, that the Opinion and Order of the United States Court of Appeals for the Sixth Circuit be reversed or in the alternative, that the matter be remanded to the Sixth Circuit to determine more fully the issues amplified upon review of this Court.

Respectfully submitted,

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Dated: May 20, 1988

# APPENDICES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES,

Plaintiff,

vs. Criminal No. 84-20228
Honorable Ralph M. Freeman

SALVATORE EVOLA,
GIROLAMO VITO PALAZZOLO, and
GIROLAMO VITALE,

Defendants.

_____/

MEMORANDUM OPINION

Defendants are charged in a three count indictment with conspiracy to possess with intent to distribute and/or distribution of cocaine in violation of Sections 841(a)(1) and 846 of Title 21 of United States code. Defendant Girolamo Vito Palazzolo is charged in only one count with conspiracy to distribute cocaine. Defendant Evola is

charged in two separate counts; one with conspiracy to possess with intent to distribute and distribution of cocaine, and the other with possession with intent to distribute 28 grams of cocaine. Defendant Girolamo Vitale has likewise been charged with conspiracy and with possession with intent to distribute 222 grams of cocaine. Defendant Pietro Alfano is only charged with conspiracy and has not been arraigned in this district. All of the Defendants in this case have been charged in similar indictments in New York for which Defendants have a separate motion to dismiss the indictment in this case or to consolidate it with the New York indictment.

The indictments arise out of ongoing court-ordered electronic

surveillance of the various Defendants which commenced in Michigan on February 3, 1984, Miscellaneous Number 84-153, in which the Honorable John Feikens entered an order authorizing interception of the home telephone of Samuel Evola in Temperance, Michigan. The application in support of such order included the affidavit of Jerome J. Cox, Special Agent for the FBI and incorporated in two appendices lengthy affidavits containing information obtained in a corresponding investigation in New York. The order of interception issued by Judge Feikens on February 3, 1984, provided for interception of conversations of Defendants Alfano, Evola, and Emanuele Palazzolo, at Defendant Evola's home telephone number in Temperance, Michigan. In a corresponding investigation in Illinois,

Judge McGarr ordered interception of Defendant Alfano's business telephone, Alfano Pizza in Oregon, Illinois, and a public telephone in the parking lot of Pineway Liquor Mart in the same town, commencing on February 6, 1984, Number 84-C20029. The order entered by Judge McGarr permitted interception of conversations of Defendants Alfano, Evola, Emanuele Palazzolo and Salvatore Mazzurco.

On March 1, 1984, Judge Feikens ordered interception of Defendant Girolamo Vito Palazzolo's home telephone and business telephone, the Romeo Car Wash, Number 3-1-84JF, listing Defendant Palazzolo, Evola, Alfano, and others unknown as interceptees.

On March 31, 1984, Judge Feikens ordered the extension of interception of wire communications of Defendant Evola's

telephone in Temperance, Michigan, listing Defendants Evola, Alfano, and Emanuele Palazzolo, Christina Evola, Cesare Pizzo, Philip Palazzolo, and Defendant Girolamo Vito Palazzolo as interceptees.

On March 5, 1984, Judge McGarr in the Northern District of Illinois signed an order granting an extension of interception of Defendant Alfano's business telephone, Alfano Pizza, and the public telephone in the Pineway Liquor Mart parking lot.

On March 31, 1984, Judge Feikens ordered another extension of the interception of Defendant Evola's telephone and finally a search warrant was issued on April 7, 1984, for Defendant Evola's home in Temperance, Michigan. The application in support of the request for a search warrant

contained a Master Affidavit which was used for other Defendants as well. Because the applications and orders authorizing surveillance are cumulative, each relying on prior affidavits and information obtained as the result of surveillance occurring contemporaneously in Illinois, New York, and New Jersey, the Court must first determine whether the initial orders of interception of Defendants' telephones were unlawful or otherwise in violation of Title III. See 18 USC § 2515.

Each of the Defendants involved has separate motions to suppress introduction of evidence derived from Title III electronic surveillance and any evidence seized as the result of the execution of a search warrant. In support of their motions, Defendants generally allege that there was no

probable cause to order the initial interception or subsequent extensions of interception. In addition, Defendants allege that the evidence derived from such wiretaps should be suppressed because the government failed to comply with certain statutory requirements of Title III and disclosed various affidavits to Judge Feikens prior to formal authorization from the Attorney General in violation of 18 USC § 2516(1).

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et. seq., governs the procedures which must be followed to obtain an order authorizing a wiretap by federal investigative agency seeking evidence of specified offenses. The legislative history of Title III indicates a dual purpose for the Act:

(1) protecting of the privacy of wire and oral communications, and (2) establishing on a uniform basis the circumstances and conditions under which interception of communications may be authorized. 1968 U.S. Code Cong. and Adm. News at 2112, 2153 (S. Rep. No. 1097) 90th Cong., 2nd Sess. (1968); United States v. Jones, 542 F.2d 661, 671 (1976); United State v. Chun, 503 F.2d533, 539 (9th Cir. 1974); United States v. Giordano, 416 U.S. 505, 514 (1973); Gelbard v. United States, 408 U.S. 41 (1972). The proper disposition of a motion to suppress under Title III is founded upon a dual inquiry--whether there has been a violation of Title III; and, if so, whether suppression is warranted for the particular violation.

The court will now address the various claims of the parties.

I. Defendant Evola

Defendant Evola first contends that evidence derived from interception of his telephone conversations should be suppressed for the reason that the government failed to establish probable cause for issuance of the order of interception as required by Section 2518 of the Act.

Section 2518 sets forth the statutory and constitutional requirements under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 for electronic surveillance applications and orders.[1] Section 2518 (3)(a) through (d) provides in pertinent part:

> (3) Upon such application the judge may enter an ex parte order, as requested or as

modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that -

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used or are about to be used, in connection with the commission of such offense, or are leased to, listed in the

name of, or commonly used by such person.

18 USC §§ 2518(3) through (d). This section has been interpreted as codifying the fourth amendment probable cause requirement that an order of interception of oral communication may not enter except upon a showing that there is probable cause to believe that an individual has committed or is about to commit a particular offense enumerated in Section 2516 and that the communication facility to be intercepted is used by such individual, and that such information concerning such offense will be obtained through such interception. See United States v. Armocida, 515 F.2d 29, 35 (3rd Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Lyons, 507 F.Supp. 551, 554 (D.C. Md. 1981).

Section 2518(1)(b) requires that a wiretap application contain a "full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued." 18 U.S.C. § 2518(1)(b). Such "particularity requirements" are not to be given an overly narrow reading, but must be interpreted in a common sense and pragmatic fashion. See United States v. Armocida, 515 F.2d at 37; United States v. Lyons, 507 F.Supp. 551, 554 (D.C. Maryland 1981).

The standards for determining if probable cause exist are substantially the same as the standards applied in conventional search warrant cases.[2] See United States v. Tehfe, 722 F.2d 1114, 1118 (3rd Cir. 1983); Unitd States v. Weinrich, 586 F.2d 481, 487 (5th Cir.

1978), cert. denied, 441 U.S. 927 (1979); United States v. Hyde, 574 F.2d 856, 862 (5th Cir. 1978); United States v. Fury 554 F.2d 522, 530 (2nd Cir.), cert. denied, 436 U.S. 931 (1977); United States v. Falcone, 505 F.2d 478, 481 (3rd Cir. 1974), cert. denied, 420 U.S. 955 (1974); United States v. Harvey, 560 F.Supp. 1040, 1050 (D.C. Fla. 1982); United States v. Marcello, 531 F.Supp. 1113, 1116 (D.C. Cal. 1982), affd. 731 F.2d 1354 (9th Cir. 1984); United States v. Fina, 405 F.Supp. 267, 270 (D.C. Pa. 1975).

Applications for electronic surveillance orders, like affidavits for conventional search warrants, area to be read in a common sense and realistic manner. In re DeMonte, 674 F.2d 1169, 1173 (7th Cir. 1982); United States v.Webster, 639 F.2d 174, 177-78 (4th

Cir. 1981), cert. denied, 456 U.S. 915 (1982); United v. Armocida, 515 F.2d at 40; United States v. Ventresca, 380 U.S. 102, 108 (1965). In addition, the decision of the issuing judicial officer as to probable cause is entitled to great weight and deference. See United States v. Landis, 632 F.2d 66, 68 (8th Cir.), cert. denied, 450 U.S. 918 (1981); United States v. Anton, 633 F.2d 1252, 1254 (7th Cir. 1980) cert. denied, 449 U.S. 1084 (1981); United States v. Chester, 537 F.2d 173, 175 (5th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); see also United States v. Lucido, 373 F.Supp. 1142, 1146 (E.D. Mich. 1974) (Freeman, J.), affd., 517 F.2d 1 (6th Cir. 1975)

In the seminal case of Berger v. New York, supra, the Supreme Court

outlined the test for probable cause as follows:

> Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed.

388 U.S. at 55. In the recent case of Illinois v. Gates, 103 S. Ct. 2317 (1983), the Supreme Court reaffirmed the test for probable cause and emphasized that the concept is not hypertechnical, nor does it require a specific quantum or type of proof to establish probable cause. Rather, the Court concluded the probable cause is a "fluid concept" involving an assessment of the probabilities in particular factual contexts. 103 S. Ct. at 2329-30. The Court emphasized that the "totality of

the circumstances" must be examined to determine if there is a " 'fair probability' that contraband or evidence of a crime will be found in a particular place."[3] 103 S. Ct. at 2332. Under the "totality of the circumstances" test, the affidavit for a search warrant must provide the judicial officer with a substantial basis or information for determining the existence of probable cause. Thus a conclusional statement of the affiant or a "bare bones" affidavit is not sufficient to provide the issuing judicial officer with a substantial basis for determining the existence of probable cause. 103 S. Ct. at 2332.

In the instant case, the government contends that there is more than adequate documentation presented to Judge Feikens to support a finding of probable cause. The government relies

heavily upon a lengthy appendix, Appendix A,[4] which details information gathered during a related investigation of a large importation and narcotics trafficking and money laundering scheme in New York. Upon review of the New York affidavit, it is unclear exactly whose communications the government sought to intercept in this application. However, the appendix is over four hundred pages in length and compiles the information received from various informants and the results of prior electronic and physical surveillance of numerous individuals, including Salvator Mazzurco, Gaetano Mazzaro, Philip Salamone, Giuseppi Ganci, and Frank Castranovo, who are allegedly involved in an international heroin trafficking and money laundering.

As the New York affidavit indicates, informants supplied information that Salvatore Catalano was the leader of a Sicilian faction of one of the five crume families in New York City who is a major heroin dealer, and that Guiseppi Ganci reports directly to Catalano. Italian authorities advised that Ganci, Castronovo, Catalano and other Italian nationals had been charged with conspiracy to further international narcotics traffic, and that Tomasso Buscetta, who was convicted on conspiracy to import heroin from Sicily, was also a fugitive on an Italian murder charge for a number of years. Informants also advised that Philip Salamone, Vito Palazzolo, Salvatore Salamone, Phillip Matassa, and Onofrio Catalano, have been involved in illegal drug sales (Appendix A, pgs. 22-23, 26-32, 98). The

affidavit submitted to the New York court details physical and electronic surveillance of these individuals and others which corroborates their alleged involvement in narcotics trafficking and money laundering (Appendix A, e.g., pgs. 40, 42-44, 46-49, 55, 60-61, 70-71, 90 and 92).

Appendix A also indicates that in the summer of 1983, an undercover agent in Philadelphia working with an informant purchased one-half to one kilogram of heroin on several different occasions from Benito Zito, who in turn is believed to have purchased heroin in New York from Ganci, whose source is Mazzurco (Appendix A, pgs. 106-124, 129-140, 146-158). Zito discussed Mazzurco's involvement with the undercover agent, indicating that Zito's sources in New York were interested in

buying 10 kilograms of heroin for $1.2 million (Appendix A, pgs. 159, 182, 185-187). Surveillance in August of 1984 revealed that Mazzurco exchanged grocery bags with an individual named Baldinucci, who was arrested a short time later with a sample of heroin of high purity and the bag given to him by Mazzurco which contained $40,000.00 in small currency (Appendix A, pg. 190).

Appendix A also indicates that on September 26, 1983, Mazzurco was observed receiving a grocery bag rolled down from the top from another individual allegedly involved in narcotics trafficking under suspicious circumstances. The appendix then revealed that Mazzurco met with four unknown individuals at a restaurant in Queens, New York, and that Mazzurco was subsequently observed leaving the

restaurant with two of these individuals, one of whom was carrying a briefcase, and that Mazzurco drove them to an auto rental office near LaGuardia Airport, where a car was rented in the name of Emanuele Palazzolo of Milton, Wisconsin (Appendix A, pgs. 198-200). The Cox affidavit submitted in support of the application for order of interception of Evola's telephone details this same incident. The latter affidavit, however, alleges that these two unknown individuals were later identified as Emanuele Palazzolo and Defendant Alfano,[5] and that the car rented in New York was presumably driven by Defendant Alfano and Emanuele Palazzolo to Toledo, Ohio, only a few miles from Defendant Evola's home in Temperance, Michigan, where the car was turned in at a rental agency on

September 27, 1984 (Cox Affidavit, pgs. 9-10). At oral argument on Defendants' motion to suppress the electronic surveillance was made of Defendant Alfano and Emanuele Palazzolo after the car was rented in Queens, New York, and that the government merely examined car rental records to determine that the car was returned to a rental agency in Toledo, Ohio. In fact, the government admits that at no time prior to the initial wiretap of Evola's telephone in February of 1984, was any physical surveillance of Defendant Evola conducted to connect Evola with Alfano or any other individual allegedly involved in narcotics trafficking.

Both Appendix A and the Cox Affidavit indicate that another surveillance of Mazzurco in New York was conducted in the week of September 26,

1983, after the time the car was allegedly turned in to the car rental agency in Toledo, Ohio, wherein Mazzurco was observed putting a grocery bag rolled down from the top in his car on September 29, 1983, and that the bag was thereafter given to two white males who had been observed with Mazzurco during the September 26, 1983, meeting (Appendix A, pgs. 201-203). Appendix A does not identify these individuals, but the Cox Affidavit indicates that these two unknown individuals, but the Cox Affidavit indicates that these two unknown individuals were later identified as Emanuele Palazzolo and Defendant Alfano. These two individuals thereafter allegedly took the paper bag to the Roosevelt Hotel, Room 985, where F. Lupo from Milan, Italy, was registered. Appendix A and the Cox

Affidavit indicate that the room records from the Roosevelt Hotel show that F. Lupo placed two telephone calls to the telephone number subscribed to Alexander Alexandro, who was arrested in November of 1983 with Tomassco Buscetta in Brazil. Brazilian authorities identified F. Lupo as a principal member of Buscetta's narcotics organization (Appendix A, pgs. 201-203; Cox Affidavit, pgs. 10-11). The affidavit does not indicate that Defendant Evola was in any way involved in this incident. The only possible connection of Evola with Lupo was several toll calls made from Lupo's hotel room to Evola's residence although the exact date or content of such calls is not known.

The Cox Affidavit submitted to Judge Feikens in support of the

application for electronic surveillance of Evola's telephone also indicates that Brazilian authorities advised the FBI agents that Faro Kupo or Lupo Faro were aliases used by Vincenzo Randazzo, who allegedly traveled to the United Stats to set up a "front company" for the Buscetta organization. This individual was not arrestd in Brazil when the authorities arrested Buscetta. A telephone book seized during Buscetta's arrest in Brazil indicated Vincenzo Randazzo's address to be Via Salvio Guiliano, 4. When F. Lupo registered at the Roosevelt Hotel in New York in September of 1983, he gave his address as "S. Guiliano 4, Milano, Italy." It is reasonable to conclude from this information that the individual registered in the hotel in New York during the week of September 26, 1983,

as F. Lupo, to whom Defendant Alfano and Palazzolo delivered a paper bag from Mazzurco, was actually Vincenzo Randazzo who was identified by Brazilian authorities as a member of Buscetta's narcotics operation The affidavit also reports that Randazzo is a nephew of fugitive Gaetano Badalamenti, and that Evola's wife is the daughter of Emanuele Badalamenti, who is the brother of Gaetano Badalamenti. However, the Affidavit admits that no specific contacts have been documented between Evola and Gaetano Badalamenti.

The Cox Affidavit also sets forth toll call records of Defendant Alfano and Emanuele Palazzolo between September 25, 1983, and October 1, 1983, which the affidavit concludes are probably related to the September 26, 1983, meeting between Mazzurco and Defendant Alfano

and Palazzolo in New York. Later in the affidavit it is noted that Alfano's wife and Emanuele Palazzolo's wife are sisters which could possibly account for numerous phone calls between the two residences, although the government does not so indicate this in the affidavit.

Appendix A and the Cox Affidavit also establish additional contacts of a suspicious nature between Alfano and Mazzurco after their September, 1983, meeting in New York. In a call intercepted pursuant to the New York electronic surveillance of Mazzurco's telephone on October 23, 1983, Alfano appeared to be making arrangements for Mazzurco to receive a telephone call from an unknown individual referred to as "our friend" (Appendix A, pg. 243; Cox Affidavit, pg. 15). The affidavit reports that review of Alfano's toll

record calls confirms that Alfano placed such a call to Mazzurco (Cox Affidavit, pg. 15). Three other calls were recorded between Alfano and Mazzurco between November 6, 1983, and November 10, 1983.

On November 29, 1983, a call was intercepted on Mazzurco's telephone from Alfano, wherein they discussed a telephone call Mazzurco was waiting to receive from Alfano's relative. During this call, Alfano told Mazzurco that if he spoke to this relative, he would tell the relative what he had to tell him (Cox Affidavit, pgs. 15-16). Neither the substance of the message nor the name of the relative was revealed during the conversation.

The affidavit also notes that there were additional phone calls intercepted between Alfano and Mazzurco which were

"cryptic and guarded" in nature and believed to be related to narcotics. The affidavit reported that on December 4, 1983, an intercepted conversation between Alfano and Mazzurco as follows:

> "Ask that guy who is very full up to his eyes for what news there is." Mazzurco replies that he has not spoken with "that guy in a couple of months." Alfano replies "Listen, speak with that guy who gave me that suit that time. This way you will know and you can tell me you spoke with so-and-so, this way for the other pants maybe there is no hope it's day to day. But for the old suits that we've used to see this way." Mazzurco replies "But what interest us is the new pants." Alfano replies "I know, we are also interested. But that guy for the moment sees that the factory still hasn't made them."

Cox Affidavit, pg. 20. The affidavit concludes that based on his experience and similar verbage in numerous intercepted telephone calls described in

Appendix A, this conversation relates to an attempt to locate a new source of supply for the narcotics and that the reference to the "factory" probably relates to a "laboratory" wherein the raw opium is made into heroin and "clothing" probably relates to the heroin itself (Cox Affidavit, pg. 20).

The affidavit indicates that calls of a similar nature were intercepted between Alfano and Mazzurco in December, 1983, and January, 1984, in which they discuss talking to the guy who Mazzurco allegedly brought suits to before to see if he had an "appetite" and to see how many and the prices of those suits (Cox Affidavit, pgs. 24, 26). Alfano also informs Mazzurco that the "factory" may or may not lower the price. In addition, several calls were arranged to be made by some unknown individual to

Mazzurco at a public telephone in New York (Cox Affidavit, pgs. 23-24; 27-28).

The only other connection between Evola and such individuals which is set forth in the affidavit is revealed in telephone toll records which indicate a pattern of telephone calls from October to December, 1983, among Evola, Alfano, Emanuele Palazzolo, and between Palazzolo and Alfano and an unidentified telephone number in Sicily. The Cox Affidavit indicates that there were approximately fifteen telephone calls placed between Alfano and Evola within this time period, a majority of those placed by Alfano from Alfano Pizza in Oregon, Illinois, and some from a public telephone in the parking lot of the Pineway Liquor Mart only one mile from Alfano's business. The affidavit concludes that the numerous contacts

among these individuals and the use of the public telephone by Alfano to call Evola and Mazzurco and various numvers in Sicily and Brazil, confirms te affiant's believe that Alfano is using the public telephone and his business telephone to discuss, plan and arrange the international trafficking of heroin (Cox Affidavit, pg. 29).

The Cox affidavit finally concludes that based on all the information related in the Cox Affidavit and Appendix A, Defendants Evola and Alfano, Mazzurco, Emanuele Palazzolo, and Vincenzo Randazzo and others are involved in narcotics trafficking and that such illegal transactions are accomplished through the use of the telephones of Evola, Alfano and Emanuele Palazzolo.

Upon review of all the information submitted in support of the initial wiretap application for Defendant Evola's telephone, the Court is convinced that under the "totality of the circumstances" the government failed to provide an adequate factual showing to warrant a person of reasonable caution to believe that an offense had been or was being committed by Defendant Evola or that Defendant's telephone was being used in the commission of narcotics trafficking as required by Section 2518(3) of the Omnibus Crime Control and Safe Streets Act. Although the affidavit submitted from the New York case is lengthy and more than adequate for a reasonable person to conclude that numerous individuals such as Defendant Alfano, Mazzurco and Vincenzo Randazzo are involved in the

importation and trafficking of narcotics, the affidavit does not even mention the Defendant Evola let along provide any nexus between Evola and this larger narcotics scheme.

Defendant Evola correctly contends that the only evidence linking him with Alfano, Emanuele Palazzolo, and Mazzurco is approximately twenty calls documented in the toll records of Alfano and Palazzolo between these individuals and Evola and two calls allegedly made by F. Lupo during his stay at the Roosevelt Hotel in New York during the week of September 26, 1983. The nature and content of these calls are unknown. The government has admitted no physical surveillance of Evola was conducted, nor were there any informants or undercover agents to confirm the government's suspicions regarding Evola's alleged

involvement with this narcotics network. Despite the overwhelming detail and almost endless cast of characters who appear to be involved in this made-for-television documentary, the government points to no evidence to connect Defendant Evola to this scenario aside from the toll record calls and a trip by two individuals in a rental car after a possible drug transaction to an area near Defendant's home in Temperance, Michigan, in September of 1983. Such evidence gives rise to nothing more than a "mere suspicion" as to Defendant Evola's involvement in this narcotics trafficking scheme.

The Sixth Circuit has held that such "mere suspicion" of illegal conduct is insufficient to establish a "fair probability" that a crime has been committed or evidence of a crime will be

found in a particular place. United States v. Algie, 721 F.2d 1039, 1043 (6th Cir. 1983); see also United States v. Anton, 633 F.2d 1252, 1254 (7th Cir. 1980); Bringar v. United States, 338 U.S. 160, 175 (1948).

In the recent case of United States v. Algie, 721 F.2d 1039 (6th Cir. 1983), the Sixth Circuit reviewed the issuance of a search warrant in a gambling conspiracy case wherein the F.B.I. obtained a pen register to monitor telephone numbers dialed from an apartment allegedly involved in a bookmaking operation. The search warrant ultimately issued arose out of an extensive investigation of a network of gambling activities in Kentucky and Ohio which revealed the involvement of three individuals who headquartered the operation from aCincinnati, Ohio

apartment. 721 F.2.d. at 1040. An affidavit in support of an application for a pen register to record telephone numbers called on the apartment's two telephones indicated that the agent believed tht the specific numbers called by the participants in furtherance of the alleged offenses would be obtained by monitoring the numbers dialed from the apartment telephones. Id. During a twelve-day period, the pen register recorded fifteen calls placed to a Highland Security Corporation. A search warrant was subsequently issued for Highland on the basis of information obtained concerning the gambling network and the involvement of several individuals of the fifteen toll record calls to Highland. During the search of Highland, a variety of gambling paraphernalia was seized which formed

the basis of Highland's motion to suppress. The district court denied the motion to suppress and on appeal the government asserted that the toll record calls should be evaluated in light of the "totality of the circumstances" which revealed the existence of a large bookmaking operation by a certain individual from three or four locations, including the apartment. Id. at 1041. In rejecting this contention, the Sixth Circuit reasoned that a common sense reading of the affidavit in support of the search warrant failed to reveal any connectio between Highland and this known bokmaking operation. Id. at 1041 n. 3. The court concluded that information concerning operation of the bookmaking scheme was only relevant if there was evidence to establish a connection between Highland and such an

established operation. Id. at 1041. In striking down the search warrant for a lack of probable cause, the court held that no demonstrable illegal activities were observed at Highland and there was no other evidence connecting Highland to such illegal operations. Id. at 1042. The Court went on to state:

> The only other possible source of probably cause is the affiant's assertion that telephones are commonly used to make lay-off bets.[5] Although bookmakers depend on the telephone to obtain and give out information, the affidavit does not indicate that every outgoing call from the Cincinnatti apartment was of an illegal nature. Indeed, a commen sense reading of the affidavit reveals that anumber of phone calls from the cincinnati apartment were made to locations with no discernible connectionto gambling operations. There is no evidence, but only a business' "mere propinquity to others

> independently suspected of criminal activity," Ybarra v. Illinois, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979). Se Sibron v. New York, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968), toling Highland Security to the known gambling operation. In our view, the evidence raises only a mere suspicion tht Highland Security Corporation was involved in illegal activities. Mere suspicion, however, is insufficient to establish any fair probability that contraband or otehr instrumentalities of crime would be found on the property of Highland Security Corporation. See, e.g., Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1948); United States v. Drake, 673 F.2d 15, 18 (1st Cir. 1982); United States v. Green, 670 F.2d 1148, 1151 (D.C.Cir.1981).

United States v. Algie, 721 F.2d at 1043.[6]

Similarly, in the matter before this Court, there is no demonstrable evidence of illegal activities involving Evola, nor is there any evidence to connect the individuals allegedly involved in the New York narcotics trafficking operation aside from the toll record calls and a car trip by two otehr individuals to an area near Defendant's home in Michigan. The government's conclusion as to Evola's involvement in this alleged narcotics trafficking scheme, at best, was purely speculative and fell far short of the factual showing necessary to establish probably cause to believ Evolva was involved in or using his telphone to arrange for illegal narcotics transctions. Accordingly, this court holds that the government failed jto establish probably cause to support the

order of interception of Defendant Evola's telephone issued on February 3, 1984, Miscellaneous Number 84-153, for which supression is an appropriate remedy.[7]

The evidence derived from this initial wiretap likewise formed the basis for subsequent extension order of interception issued by Judge Feikens of Defendants Evola's telephone on March 3, 1984, and March 31, 1984, and for the ultimate search warrant issued on April 9, 1984, of Evola's home in Temperance, Michigan. As in the instant case, the government may rely upon conversations intercepted during initial electronic surveillance to privide probably cause for renewal and an order of interception.[8] Where, however, as in the case at hand, an extension order is dependent upon evidence illegally

obtained pursuant to an initial order of interception, evidence obtained as a result of such extension order is "derivative evidence' within the meaning of Section 2515 and inevitably tainted and must be suppressed.[9]

As a second basis of suppresion, Defendant Evola contends taht the application for surveillance did not contain a full and complete statement as to the adequacy of otehr investigatory procedures in the cse as required by Section 2518(1) (c). Defendant asserts taht the application contains a boiler plate recitation of the difficulties of investigating a drug conspiracy of this nature and conclusional statements as to the necessity for a wiretap, but does not provide a factual basis to support these generalized allegations of need.

Section 2518(1)(c) provides that the application for a wiretap order must contain:

> a full and complete statement as to whether or not other investigatory procedures have been tried and failed or why they reasonably appear unlikely to succeed if tried or to be too dangerous[.]

18 USC § 2518(1)(c). This "necessity" requirement was established to "assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States v. Kahn, 415 U.S. 143, 153 n.12 (1974); see also United States v. Landmesser, 553 F.2d 17, 19 (6th Cir. 1977). In the case of United States v. Giordano, 416 U.S. 505 (1974), the Supreme Court emphasized:

> Congress legislated in considerable detail in providing for applications and

> orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications. These procedures were not to be routinely employed as the initial step in criminal investigation. Rather, the applicant must state and the court must find that normal investigative procedures have been tried and failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

416 U.S. at 515. Despite what appears to be a requirement of strict necessity to obtain an order for interception, the legislative history reveals, and the number of the courts of appeal have interpreted the government's burden to establish compliance with Section 2518(1)(c) as "not great." See e.g. United States v. Landmesser, 553 F.2d at 20; United States v. Anderson, 542 F.2d 428, 431 (7th Cir. 1976); United States

v. Armocida, 515 F.2d 29, 38 (3rd Cir. 1975); see also United States v. Dorfman, 542 F. Supp. 345, 399 (N.D. Ill. 1982); S. Rep. No. 1097, 1968 U.S. Code Cong. & Ad. News, p. 2190 (Congress intended that the showing envisioned by §2518(1)(c) can be tested "in a practical and common sense fashion"). Moreover, it is clear that the purpose of Section 2518(1)(c) "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." United States v. Fury, 554 F.2d 522, 530 (2nd Cir. 1977); United States v. Pacheco, 489 F.2d 554, 565 (5th Cir. 1974), cert. denied, 421 U.S. 909 (1975); United States v. Landmesser,

533 F.2d at 20; see also United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975), cert. denied, 423 U.S. 924 (1975). In determining whether other investigative methods might be successfully employed, the issuing judge is given considerable discretion. Landmesser, supra; United States v. Smith, 519 F.2d 516, 518 (9th Cir. 1975); United States v. Daly, 535 F.2d 434, 438 (8th Cir. 1976). In the Sixth Circuit opinion of United States v. Landmesser, 533 F.2d 17 (6th Cir. 1977), the court followed the lead of other circuits in recognizing the difficulty in such cases of proving a negative and concluded that the "only requirement is that there be a 'factual predicate' in the affidavit" for concluding that other investigative

methods might not be successfully employed^R

. 533 F.2d at 20.

Defendant Evola contends that the government failed to meet this factual predicate; that the affidavit in support of the wiretap application was wholly conclusory as to the need for the wiretap and merely contains a boiler-plate recitation of the difficulties of investigating a drug conspiracy of this nature. In addition, Defendant asserts that the government's claim that other investigative methods are not likely to succeed is based upon the assertions of the prior experience of the agent in the investigation of similar criminal operations and is without any factual relation to circumstances in this case.

Defendant is correct in asserting that conclusional statements, in the

absence of any factual relation to the particular circumstances of a case, is insufficient to satisfy the requirements of Section 2518(1)(c). See United States v. Landmesser, 533 F.2d at 20. However, "the mere fact that the affidavit ... rested in part on statements that would be equally applicable to almost any gambling case does not render the affidavit insufficient." Id.; see also United States v. Matya, 541 F.2d 741, 745 (8th Cir.), cert. denied, 429 U.S. 1091 (1977). Moreover, the Sixth Circuit has squarely held that the "prior experience of investigative officers is indeed relevant in determining whether other investigative procedures are unlikely to succeed if tried[.]" Landmesser, 533 F.2d at 20; see also United States v. Matya, supra; United States v. Vento, 533 F.2d 838,

850 n. 19 (3rd Cir 1976); United States v. Kerrigan, 514 F.2d 35, 38 (9th Cir. 1975), cert. denied, 423 U.S. 924 (1975); In re Dunn, 507 F.2d 195, 197 (1st Cir. 1974). The controlling question is whether the affidavit supplies a factual predicate for such general statements. Id. In determining whether there is a factual predicate, the court need not read the allegations in isolation from the remainder of the affidavit. United States v. Landmesser, 533 F.2d at 20; see also United States v. Martinez, 588 F.2d 1227, 1231 (9th Cir. 1978).

In the instant case, the affidavit submitted in support of the original application for interception of Defendant Evola's telephone asserts the following:

> Due to the style or modus operandi of Salvatore-Mazzurco, Samuel Evola, Pietro Alfano and Emanuele Palazzolo and the general nature of the crime of conspiracy itself, normal investigative techniques, such as interviewing associates, physical surveillance of Salvatore Mazzurco, Samuel Evola, Pietro Alfano and Emanuele Palazzolo, and other investigative techniques appear doomed to failure. Attempts at these techniques and others not noted above, have been attempted, but have met with no production of tangible evidence regarding the above enumerated offenses as set forth more particularly in the "Need Section" of this affidavit and Appendix B attached.

The Need Section of the affidavit contends that based on the information contained in Appendices A and B, the need for interception of Defendant Evola's telephone is apparent. As this Court has already determined, Appendix A does not show any nexus between Defendant Evola and the alleged narcotics

conspiracy in New York other than through toll record calls and a suspicious trip by two individuals in a rental car from New York to an area near Defendant Evola's home in Michigan. Similarly, Appendix B, which is an affidavit submitted in support of continued interception of telephone communications of a number of New York individuals said to be involved in such narcotics conspiracy, including Defendant Alfano, makes no reference to Defendant Evola or his involvement with this conspiracy. Thus, contrary to the government's contention, the need for interception of Defendant Evola's telephone is far from apparent. The appendices upon which the government relies to establish the need for electronic surveillance do not even refer to Evola or establish that any

other investigative steps have been taken with respect to Evola. The investigative procedures outlined in such affidavits relate to other suspects in this alleged conspiracy. A showing that normal investigative techniques was inadequate with respect to some individuals is not sufficient to establish necessity with respect to other individuals or telephone numbers. United States v. Santora, 583 F.2d 453, 466-68 (9th Cir. 1978), remanded on other grounds, 441 U.S. 939 (1971), reaffirmed on present grounds, 600 F.2d 1317, 1321-24 (9th Cir. 1979).

In addition, the agent goes on to allege in this case in the Need Section that the information obtained during the investigation shows the relationship and contacts among the individuals involved in the narcotics trafficking, but that

these techniques do not fully reveal the exact nature of the criminal conspiracy or identify all of the participants in the conspiracy. The agent makes further general allegations that informants are non-existent or unable or unwilling to provide more concrete information regarding the conspiracy and that given the unique characteristics of narcotic smuggling conspiracies, other means of investigation are not viable. Finally, the agent concludes that generally accepted means of obtaining information such as interviewing co-conspirators, consensually recording conversations, or using the grand jury procedure would be unsuccessful due to the lack of cooperating individuals.

Such allegations to support an order for interception of Evola's telephone are wholly conclusional and

generalized statements that normal investigative procedures are unlikely to succeed. The affidavit, even when read in conjunction with all of the other supporting material as required by Sixth Circuit in the Landmesser decision, is not supported by particular facts as to what specific investigative steps were taken with respect to Evola, or what information was obtained from physical surveillance or informants as to Evola, or why in this particular case normal investigative techniques were not viable. In fact, the government has admitted that there was no physical surveillance or informants used with respect to Defendant Evola, nor was there any information that Evola's telephone was used for criminal activities, prior to the first order of interception in February of 1984. As

Defendant correctly contends, such standardized allegation in the affidavits submitted in the Evola case could be employed in an affidavit in any narcotics case. Indeed, this Court notes that identically worded allegations appear in affidavits submitted by Special Agent Gerald Lee Miller in a related narcotics investigation of Pietro Alfano in the Northern District of Illinois and in the affidavits submitted by Special Agent Cos in an investigation of Defendant Girolama Vito Palazzolo in the Eastern District of Michigan. Such fungible allegations of the necessity for electronic surveillance without factual support in the affidavits are insufficient to demonstrate that electronic surveillance procedures have not been routinely employed as the initial step in a

criminal investigation, United States v. Landmesser, 553 F.2d at 20, and accordingly, suppression is warranted.

Defendant Evola next contends that suppression of evidence derived from the various orders of interception in this matter is mandated because the Assistant United States Attorney in charge of the investigation turned over copies of the lengthy affidavit used to support a previous application for surveillance in a related investigation in New York to Judge Feikens several days prior to the actual authorization of the application for interception by the Attorney General.[10] The government attorney in charge of the investigation admits that he turned over the 400-page affidavit prior to approval by the Attorney General, but alleges that this was done merely as a convenience due to the

length of the document. The government contends that this does not constitute an unlawful application for electronic surveillance by a government attorney without authorization of the Attorney General because no application accompanied this unrelated affidavit.

Before an application may be filed with a federal court seeking surveillance order, Section 2516(1) requires that either the "Attorney General, or any Assistant Attorney General specifically designated by the Attorney General" must authorize the filing of the application. 18 USC § 2516(1). In United States v. Giordano, 416 U.S. 505, 515 (1974), the Supreme Court held that failure to obtain authorization by the Attorney General or a designated officer for an application for surveillance under Section 2516(1) warranted suppres-

sion of evidence derived from the wiretap.[11] Not every failure to comply with the statutory requirements of the Title III, however, renders interception unlawful otherwise in violation of the act, thus mandating suppression. United States v. Chaves, 416 U.S. 562, 574-75 (1974). In Giordano, the Supreme Court held that suppression is warranted under Section 2515 for statutory violations only where such violations "directly and substantially implement the congressional intent to limit the use of intercept procedures to those situations clearly calling for employment of this extraordinary investigative device." 416 U.S. at 527. Under Giordano, the ultimate question is whether the statutory provision which has been violated "was intended to play a central

role in the statutory scheme." 416 U.S. at 528.

The Defendants do not contend, nor is this a case where the Attorney General did not actually approve the applications for surveillance. Consequently, this Court must determine, in light of the ultimate approval of the application for surveillance, whether early disclosure of a supporting affidavit warrants suppression. This Court holds that submission of a supporting affidavit prior to formal authorization of the Attorney General does not warrant suppression. Although the technical steps for seeking court approval were not followed, the government complied with the substance of the statutory requirement requiring prior approval of the Attorney General before seeking an application for

surveillance. Thus, the purpose of the statutory provision requiring approval was fulfilled despite the violation and Defendant's claim for suppression on this basis must fail. See United States v. Donovan, 429 U.S. 413, 435-38 (1977).

II Defendant Girolamo Vito Palazzolo

Defendant, Girolamo Vito Palazzolo, seeks to suppress introduction of evidence derived from the electronic surveillance of several different telephones: (1) surveillance of Defendant Evola's telephone in the Eastern District of Michigan, Miscellaneous Number 84-153, dated February 3, 1984, wherein Defendant Palazzolo alleges he was overheard during the course of monitoring, and any subsequent extensions thereof; (2) surveillance of Defendant Alfano's business telephone, Alfano Pizza, and a

nearby public telephone in Oregon, Illinois, as a result of an order of interception entered by Judge McGarr, 84-C2--20, dated February 6, 1984, and any extensions thereof; (3) surveillance of Girolamo Vito Palazzolo's home telephone in Sterling Heights, Michigan, and his place of business, the Romeo Car Wash, in Washington Township, Michigan, by order of Judge Feikens, dated March 1, 1984, Miscellaneous Number 3-1-84JF and subsequent extensions thereof on 3-3-84, 3-15-84 and 8-31-84.

Defendant asserts that suppression is mandated because there was no probably cause for surveillance of any of these telephones. However, Defendant fails to articulate the precise basis of his assertions or the specific evidence he contends is constitutionally objectionable, asserting only generally

that the government did not have probably cause to support various orders of interception. Defendant relies almost exclusively upon the legal authority and analysis cited by Defendant Evola's counsel in support of his motion to suppress evidence derived from electronic surveillance. In seeking the suppression of evidence derived from a wiretap, the burden of proof is on the Defendant to prove a statutory or constitutional violation of rights which justifies suppression. United States v. Feldman, 606 F.2d 673 (6th Cir. 1970).

This Court has already ruled that there is no probably cause to support an order of interception of Defendant Evola's telephone on February 3, 1984, Miscellaneous Number 84-153. Accordingly, any evidence derived from

such interception or extension of the Evola wiretap, including evidence obtained as the result of conversations overheard between Evola and Defendant Palazzolo, must be suppressed.[12]

Defendant Palazzolo next claims that suppression of evidence derived from interception of Defendant Alfano's business telephone, Alfano Pizza, and a nearby public telephone in Oregon, Illinois, as a result of an order of interception entered by Judge McGarr on February 6, 1984, Number 84-C20029, in the Northern District of Illinois, wherein Defendant Palazzolo was intercepted as a party to a conversation, is likewise mandated because there was no probable cause established by the government to support such interception.[13]

The affidavits in support of the Alfano wiretap are essentially identical to the affidavits submitted in support of the application for interception of Defendant Evola's telephone and likewise incorporate the New York affidavit in an appendix. Defendant asserts that such affidavits are bolstered by stale and conclusionary claims regarding conduct of individuals other than Defendant Palazzolo and contain no more than mere inference and suspicion.

As this Court already noted, there does appear to be more than adequate evidence presented in such affidavits to support a finding of probable cause to intercept both Defendant Alfano's business telephone and the public telephone in the Pineway Liquor Mart in Illinois. The information set forth in the affidavit submitted in the

corresponding New York investigation and the relevant affidavit in this case reveal physical surveillance of Defendant Alfano in New York on several occasions where Alfano was observed with Mazzurco under circumstances which appear to involve the exchange of narcotics. In addition, such affidavits also report Alfano's trip by rental car from New York to Toledo, Ohio, after one such meeting with Mazzurco. Such a trip by rental car is indeed suspicious given that Defendant Palazzolo lives in Illinois. While such incidents arguably might appear to be harmless, the Court is not required to view each event in a vacuum. As this Court has indicated, the New York Affidavit details numerous incidents involving Mazzurco which provides more than sufficient evidence from which a reasonable person could

conclude that Mazzurco and other individuals are engaged in a narcotics trafficking scheme of international proportions. Alfano likewise appears to be more than a passing acquaintance of Mazzurco, being intercepted on numerous occasions and conversations with Mazzurco during court-ordered surveillance of Mazzurco's telephone in New York. Toll records for Alfano's telephone and the public telephone in Oregon, Illinois, confirm such interceptions. In addition, as the affidavits allege, the character of these intercepted calls appear to be cryptic and guarded,[13] and involved use of counter surveillance such as arranging and placing calls from various public telephones.

Even under the most restricted reading of the evidence presented in

these affidavits submitted in support of the Alfano wiretap, probable cause is apparent and Defendant Palazzolo's motion for suppression on this basis cannot stand.

Defendant Girolamo Vito Palazzolo also seeks to suppress introduction of evidence derived from electronic surveillance of Defendant's home telephone in Sterling Heights, Michigan, and his place of business, the Romeo Car Wash. The application and order in such matter was first entered on March 1, 1984, by Honorable John Feikens, Miscellaneous Number 3-1-94-JF. The application included the affidavit of Special Agent Marvin Green and two appendices, which were the same affidavits filed in the Evola case and the related case in New York.

In support of his motion, Defendant Palazzolo asserts that the evidence derived from the wiretaps of Defendant's home and business should be suppressed under the "fruit of the poisonous tree" doctrine as outlined in the Sixth Circuit opinion of United States v. Wac, 498 F.2d 1277 (6th Cir. 1974). Defendant contends that reliance on information and evidence obtained as the result of the illegal surveillance of Evola's telephone where Defendant Palazzolo was a party to a conversation to support the application for interception of Defendant Palazzolo's telephone renders the latter interception fatally defective.[14]

In United States v. Wac, the Sixth Circuit held that where a second wiretap application relied upon information obtained from a prior illegal wiretap

relating primarily to the same individuals, evidence obtained from the second wiretap is rendered inadmissible as tainted fruit under the statutory exclusionary rule enunciated in 18 U.S.C. § 2515.[15] 498 F.2d at 1231-32. In interpreting the statutory exclusionary rule outlined in Section 2515, the Court concluded that "[t]he words "derived therefrom" [in Section 2515] clearly extend beyond evidence directly obtained as a result of the surveillance order." 498 F.2d at 1232. The court went on to state:

> There is no indication that the standard of exclusion to be applied to illegally obtained information disclosed in application relied upon to grant a new order is less stringent than that applied to illegally obtained information disclosed in an application relied upon to grant extension. The words "derived therefrom" clearly extend the right of exclusion beyond

> evidence directly obtained as a result of a surveillance order. This appears to be a codification of the "fruit of the poisonous tree" doctrine. Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). See United States v. Giordano, supra, dissenting opinion of Mr. Justice Powell, 416 U.S. at 558-561, 94 S.Ct. 1820, 40 L.Ed.2d 341. the record demonstrates a connection between the results of the first order and the asserted need for the second. The reliance on those results in support of the second application indicates that this connection had not "become so attenuated as to dissipate the taint." Nardone, supra, 308 U.S. at 341; Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

498 F.2d at 1232. Under the poisonous fruit doctrine, the mere existence of tainted evidence does not perforce render all evidence which follows inadmissible. "Rather the more apt question in such a case is 'whether,

granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of the illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" Wong Sun v. United States, 371 U.S. 471, 488 (1963).

A mere cursory review of the affidavit submitted in support of the application for the wiretap and extensions thereof of Defendant Girolama Palazzolo's telephones indicated that the information obtained as the result of the illegal surveillance of Defendant Evola's telephone was "essential in fact" to the granting of the order of interception of Palazzolo's telephones. The affidavit recounts a number of conversations overheard as the result of the illegal Evola wiretap and included

the affidavit submitted in the Evola case to support an allegation that probable cause existed to intercept Palazzolo's telephone. Given the complicated and interrelated nature of the individuals in this alleged narcotics trafficking scheme and the reliance upon such illegally obtained evidence, this Court concludes that the connection had not become so attenuated as to dissipate the underlying taint of the Evola tap. Accordingly, Defendant Girolama Palazzolo's motion to suppress with respect to evidence derived from electronic surveillance of Palazzolo's home telephone in Sterling Heights and his business telephone at the Romeo Car Wash will be suppressed.

III. Defendant Girolamo Vitale

Girolamo Vitale also seeks to suppress evidence obtained as the result

of electronic surveillance of Defendant Alfano's business telephone, Alfano's Pizza, and a public telephone allegedly used by Alfano in the parking lot of the Pineway Liquor Mart in Oregon Illinois, one mile from Alfano's Pizza, first ordered by Judge Frank J. McGarr, Misc. No. 84-C-20229, in the Northern District of Illinois on February 6, 1984. Defendant Vitale is charged along with the other Defendants named in this matter in two counts with conspiracy to possess with intent to distribute 222 grams of cocaine, and with possession with intent to distribute cocaine, all in violation of 21 USC §§ 846 and 841(a)(1). The 222 grams of cocaine were seized as the result of execution of a search warrant on April 7, 1984, which Defendant also challenges in a separate motion.

Defendant Vitale contends, as do the other Defendants, that the application for surveillance of Defendant Alfano's business and the public telephone in the Pineway Liquor Mart in Oregon, Illinois, did not contain a full and complete statement as to the adequacy of other investigatory procedures as required by Section 2518(1)(c).

The affidavit submitted in support of the initial wiretap of Alfano's business phone and the nearby public telephone contains generalized allegations of necessity identical to the allegations in the affidavit submitted to Judge Feikens in support of the wiretap of Evola's telephone. The affidavit alleges:

> d. Due to the style or modus operandi of other named principals and the general

> nature of the crime of conspiracy itself, normal investigative techniques, such as interviewing associates, physical surveillance of the principals, etc., appear doomed to failure. Attempts at these techniques and others not noted above, have been attempted but may meet with no production of tangible evidence regarding the above enumerated offenses as set forth more particularly in the "Need Section" of this affidavit and Appendix B attached.

Affidavit, p. 3. The affidavit for the Alfano wiretap likewise relies upon Appendices A and B, which are the same appendices submitted with the application for interception of Defendant Evola's telephone in the Eastern District of Michigan. The "Need Section" similarly alleges that although the investigation to date indicates the relationship and contacts between the various principals and associates, these investigative techniques "do not fully

show the exact nature of the criminal conspiracy nor do they identify all of the participants in the conspiracy." Affidavit, p. 30. As in the Evola affidavit, the affidavit submitted in support of the Alfano wiretap further states that the unique nature of narcotics smuggling conspiracies such as this one prohibits other investigative techniques such as obtaining interviews of cooperating co-conspirators, consensually recording co-conspirators, or using a grand jury or informants.

Defendant Vitale contends, as did Defendant Evola, that such allegations are merely boilerplate recitations of the difficulty of investigating any narcotics conspiracy case. Defendant also asserts that the government has a cooperating informant and undercover agent who orchestrated three large

narcotic purchases directly from Benito Zito in Philadelphia. Defendant alleges that surveillance established Zito's connection with a number of principals in this matter including Ganci, Mazzurco, Mazzara, Castronovo, Cavallaro and Lamberti in New York. Defendant claims, contrary to the government's contention in the affidavit, that there was "substantial admissible evidence" against these key individuals, who in turn have been linked to Pietro Alfano. Defendant contends that because normal investigative techniques were successful in this case, electronic surveillance was unnecessary.

After a careful review of the supporting affidavit and appendices in this matter, this Court holds that, unlike the affidavits in the Evola wiretap, there was a sufficient factual

predicate established as required by the Sixth Circuit opinion in United States v. Landmesser, to support the conclusion that normal investigative procedures had been tried and failed or were unlikely to succeed if tried. The affidavit submitted by Special Agent Gerald Lee Miller indicates that investigative steps taken with respect to Defendant Alfano and other individuals from New York allegedly involved in a narcotics trafficking scheme which indicate a pattern of covert communications from public telephones in cryptic or guarded conversations. In addition, Appendix A also reveals numerous contacts between Alfano and Mazzurco in New York and the suspicious circumstances surrounding the trip of Pietro Alfano and Emanuele Palazzolo from New York to Toledo. Despite such documented conversations,

and physical surveillance, agents were unable to determine Alfano's exact role in this alleged conspiracy, nor were they able to obtain admissible evidence to establish Alfano's involvement in such conspiracy.[16] Although this evidence as detailed in the affidavit and appendices was sufficient to show a connection between Alfano and the individuals in an alleged narcotics enterprise, traditional techniques were not sufficient to expose the scope of the conspiracy, the manner in which narcotics were imported and distributed, or the precise involvement of Alfano or the other co-conspirators.

Courts have consistently held that the provisions for electronic surveillance under Title III may be employed to discover the full nature and extent of a conspiracy and evidence

necessary to prosecute all participants. See United States v. Robinson, 698 F2d 448, 453 (D.C. Cir. 1983; United States v. Terry, 702 F.2d 299 (2nd Cir. 1983); United States v. Messersmith, 692 F.2d 1315, 1317-18 (11th Cir. 1982); United States v. Martinez, 488 F.2d 1227, 1232 (9th Cir. 1978)(en banc); United States v. Armocida, 515 F.2d 29, 38 (3rd Cir. 1975); United States v. Vento, 533 F.2d 838 (3rd Cir. 1976). Contrary to Defendant Vitale's contention, the cooperating informants and co-conspirators in this case were unable to provide information as to the full extent of the conspiracy or all the participants. Despite the extensive knowledge of the conspiracy gained during the course of this investigation, it would be unrealistic to restrict the government in determining the entire

scope of such narcotics trafficking scheme. See United States v. Armocida, 515 F.2d at 38; United States v. Hinton, 543 F.2d 1002 (2nd Cir.) cert, denied, 429 U.S. 980 (1976). Moreover, as this Court has already noted, the government need not exhaust every other imaginable method of investigating prior to employing electronic surveillance.

Accordingly, this Court holds that the affidavit and appendices submitted to Judge McGarr were sufficient to establish the normal investigative procedures reasonably appear unlikely to succeed in this matter, and Defendant Vitale's motion to suppress evidence obtained as a result of electronic surveillance of Alfano's telephone pursuant to an order issued by Judge McGarr, Number 84-C20029, dated

February 6, 1984, and any extensions thereof, will be denied.

RALPH M. FREEMAN
United States District Judge

Dated: September 13, 1985

1. The federal offenses which may be investigated by electronic surveillance under 2516(1) may be divided into three general categories; (1) national security offenses, (2) intrinsically dangerous crimes, including trafficking in narcotics, marijuana, or other dangerous drugs, and (3) organized crime activities.

2. Prior to enactment of Title III, the Supreme Court made clear federal authority to regulate and control bugging by state and federal authority In Berger v. New York, 388 U.S. 41 (1967), the Court struck down a New York statute authorizing wiretapping by police officers a violative of the fourth amendment. The court held that the fourth amendment required that the place to be searched and persons or things to be seized be specifically described. The court also determined that the statute in question contained no limitations on the execution of the warrant concerning either what could be seized, the period of surveillance, or the executing officer's discretion. The statute also failed to require notice of the surveillance or a showing of probably cause for renewal orders. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court held that attachment of a bug to the outside of a phone booth constituted an unreasonable search and seizure under the fourth amendment. The court concluded that the but "violated the privacy upon which the defendant justifiably relied while using the telephone booth" 389 U.S. at 351. When Title III was enacted in 1 Congress

incorporated the probable cause standard enunciated in Berger and Ka in Section 2518. See S.Rep. No. 1097, 90th Cong., 2d Sess. 66 (1968), reprinted in 1968 U.S. Code Cong. & Ad. News 2112, 2153, cert. denied, 104 S.Ct. 1679 (1984).

3. The court in Gates abandoned the rigid "two-pronged test" enunciated in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969), for determining whether an informant's tip establishes probable cause for issuance of a warrant for the "totality of the circumstances" approach. The court concluded that the issuing judicial officer may consider all the circumstances set forth in the affidavit, including the "veracity" and "basis of knowledge" of persons supplying hearsay information in determining if there is a fair probability that evidence of a crime will be found in a particular place. 103 S. Ct. at

4. Appendix A was originally submitted to the District Court for the Eastern District of New York, Southern Division, in support of an application for an order authorizing continued interception of oral and wire communications in a related narcotics investigation.

5. The latter affidavit indicates that Defendant Alfano is self-employed in the pizza business and lives in Oregon, Illinois, and that Palazzolo, who is not a defendant in this case, is also in the

pizza business and lives in Milton, Wisconsin.

6. Compare Algie with United States v. Tehfe, 722 F.2d 1114 (3rd Cir. 1983), cert, denied, 104 S. Ct. 1679 (1983) (affidavit based on surveillance reports and pen register records which revealed extensive criminal enterprise involving defendant established probable cause under "common sense approach" to believe telephone integral part illegal operations) and United States v. Todisco, 667 F.2d 255 (2d Cir. 1982), cert denied, 455 U.S. 906 (1982) (affidavits based on pen registers and surveillance of defendant with known drug dealers sufficient to establish probably cause to believe telephone used for illegal activity).

7. Section 2515 of Title III provides that no part or contents of any wire or oral communication, and no evidence derived therefrom may be received at trial "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515.

8. Under Section 2518(1)(f), an application for an extension order must include "a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such result," in addition to all of the evidence necessary to establish probable cause and to show the inadequacies of other investigatory procedures. See United States v. Williams, 737 F.2d 594, 601-02 (7th Cir. 1984) (en banc), cert.

denied, 105 S. Ct. 1355 (1985); United States v. Feldman, 606 F.2d 673, 681-82 (6th Cir. 1979) (en banc), cert. denied, 445 U.S. 961 (1980); United States v. Harvey, 560 F. Supp. 1040 (D.C. Fla. 1982).

9. In United States v. Giordano, 416 U.S. 505 (1974), the Supreme Court addressed the issue of whether an initial application which was improperly authorized invalidated an extension order which had otherwise been validly issued. The Court held that where evidence illegally obtained from the initial wiretap is included in the extension application, the extension order is invalidated. 416 U.S. at 533. The Court reasoned that the results were "presented, considered, and relied on" and "essential both in fact and in law, to any extension of the intercepted authority." Id. In the instant case, the extension orders and search warrant issued were likewise dependent on evidence illegally obtained pursuant to the initial order of interception of Defendant Evola's residence telephone, and suppression is required. See also United States v. WAC, 498 F.2d 1227 (6th Cir. 1974) (second surveillance order fatally "tainted" when relied upon prior illegal wiretap).

10. Defendant Girolamo Vito Palazzolo also seeks suppression of the evidence derived from the wiretap of Evola's telephone where he was "party" to the conversation and suppression of evidence derived from surveillance of his home telephone in Sterling Heights,

Michigan, and his business telephone, the Romeo Car Wash on the basis that copies of the affidavits in question were disclosed to Judge Feikens prior to actual authorization of the application by the Attorney General. Accordingly, this Court will address both Evola's and Palazzolo's claim in this section.

11. The Court in Giordano reasoned that Section 2516(1) was intended by Congress to limit the power to authorize applications to the Attorney General or his designate. The Court determined such procedure substantially implemented the Congressional intent to assure that "the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." 416 U.S. at 515.

12. Because suppression of evidence from the Evola wiretaps is already mandated, this Court need not address Defendant Palazzolo's additional claim that suppression of evidence from the Evola taps is required because of the alleged improper disclosure of conversations to individuals who spoke Italian without being properly deputized. The order of interception entered by Judge Feikens did not contain a provision for the use of specially deputized individuals to monitor conversations occurring in Sicilian. The Court notes that even if such unauthorized disclosure had occurred, which the government denies, and the interception of Evola communications was otherwise in accordance with Title

III, the Sixth Circuit has held that suppression is not an appropriate remedy for improper disclosure of information derived from an otherwise legally intercepted communication. Resha, et. al v. United States, No. 84-5012 (6th Cir. July 11, 1985).

13. Although both Defendant Alfano and Evola assert that conversations involving such alleged "code words" as "shirts," "factory," "ovens," "pizzerias," "blankets," "stores," and "tomatoes" are not cryptic, and that allegations to that effect by agents are not sufficient to support a finding of probably cause, courts which have addressed the issue have found otherwise. See United States v. Shakur, 560 F. Supp. 318, 334-35 (S.D. N.Y. 1983); United States v. Sisca, 503 F.2d 1337, 1343 (2nd Cir.), cert. denied, 419 U.S. 1008 (1974); United States v. Manfredi, 488 F.2d 588, 597 (2nd Cir), cert. denied, 417 U.S. 936 (1974). Such allegations in the instant case carry even stronger weight as the New York affidavit reveals that certain co-conspirators expressly identified these words as code words for narcotics. Appendix A, pgs. 119, 146, 160).

14. As this Court has already noted, because Defendant Palazzolo is a party to conversations occurring during the course of Evola's wiretap, Defendant Palazzolo has standing to challenge not only evidence derived directly from the Evola wiretap, but also any "fruits" thereof. See Alderman v. United States, 394 U.S. 165 (1969).

15. Section 2515 provides in pertinent part that "[w]henever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding . . . if the disclosure of that information would be in violation of this chapter.

16. The difficulties of obtaining evidence against many of the individuals involved is particularly apparent in appendix A where physical surveillance revealed that numerous meetings between the individuals involved took place in cars and restaurants and telephone calls were made from different public telephones. In fact, normal investigative procedures failed to reveal Defendant Alfano's identity other than by the name of "Pietro" until later in the investigation.

APPENDIX B

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 85-1845
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA, | ) | |
| | ) | |
| Plaintiff-Appellant, | ) | ON APPEAL FROM |
| | ) | THE UNITED |
| vs. | ) | STATES DISTRICT |
| | ) | COURT FOR THE |
| PIETRO ALFANO, et al., | ) | EASTERN DISTRICT |
| | ) | OF MICHIGAN. |
| Defendants, | ) | |
| | ) | |
| SALVATORE EVOLA, | ) | |
| GIROLAMO VITO PALAZZOLO, | ) | |
| | ) | |
| Defendants-Appellees. | ) | |

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Decided and Filed January 29, 1988

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Before: JONES, MILBURN and BOGGS,
Circuit Judges.

BOGGS, Circuit Judge. This case involves an extensive government investigation and surveillance of an alleged conspiracy for the importation of large quantities of heroin and cocaine from Italy, involving the cooperation of a number of Americans in New York, Illinois, Wisconsin and other states, and a number of Italians primarily from Sicily.[1]

The existence of an underlying conspiracy among some persons is not disputed here. The dispute concerns the use at the trial of alleged conspirators of extensive tape recordings of conversations among the

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[1] A number of the defendants herein have recently been convicted in trials in the United States District Court for the Southern District of New York, and sentenced to long prison terms. Case No. 84 CR 236 (Laval, D.J.): N.Y. Times, June 23, 1987, at A1, col. 5.

defendants and various admitted members of the conspiracy. These recordings were made pursuant to a warrant issued on February 3, 1984, by Chief United States District Judge John Feikens, under 18 U.S.C. §2518(3). Defendants contend that this warrant is fatally defective because it rested primarily on records of a series of telephone calls secured by the use of a pen register authorized under another warrant whose validity is not contested here. The issue is whether the evidence of a number of calls made within relatively short periods of time among defendants here and admitted conspirators, coupled with other knowledge contained in the affidavit for the wiretapping warrant, constituted probable cause for issuance of that warrant. The trial judge, District Judge Ralph Freeman,

held that probable cause did not exist, and suppressed all evidence stemming from the warrant-authorized tape recordings.

The government has taken an interlocutory appeal on this issue, as a very large part of the evidence that would be submitted at the trials of defendants Samuel Evola, Girolamo Vitale, and Girolamo Palazzolo consists of material derived from sources growing out of the suppressed wiretap. We hold that the warrant issued by Chief Judge Feikens carefully complied with the requirements of Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 U.S.C. §2518(3), and we reverse.

I

The underlying evidence presented in the affidavit for a search warrant, which is not contested here, may be summarized as follows.

The key players in our case, many of whom are related, are Salvatore Mazzurco, Pietro Alfano, Salvatore Evola, and Emanuele Palazzolo. Girolamo Palazzolo, a defendant in this case, is not involved in the events at issue here. He was implicated later by materials developed under the wiretap at issue here. The trial judge agreed that the underlying conspiracy existed, and the connection to it of numerous persons was clearly shown. At issue is the evidence of Evola's connection to the conspiracy, and whether it is sufficient to authorize the issuance of a warrant for a tap on his phone.

A brief description of the parties and their relationship is in order at this time. Salvatore Evola is married to the niece of Gaetano Badalamenti, whom evidence shows to be the leader of an international drug smuggling conspiracy. Badalamenti resides in

Sicily. Evola lives in Temperance, Michigan, near the Ohio border and near the Detroit airport. Pietro Alfano lives in Oregon, Illinois, about 100 miles from Chicago, where he operates Alfano's Pizza, a business one mile from the Pineway Liquor Mart. Mazzurco lives and operates a pizza parlor in Long Island, New York, while Emanuele Palazzolo lives in Wisconsin. The wives of Alfano and Palazzolo are sisters.

As District Judge Freeman agreed, in his opinions suppressing the wiretap evidence, the evidence was sufficient "for a reasonable person to conclude that numerous individuals such as defendants Alfano, Mazzurco and Vincenzo Randazzo are involved in the importation and trafficking of narcotics...."

II

Given these underlying facts, the undisputed evidence of the calls detailed by the authorized pen registers and by other wiretaps not contested here presents a series of circumstances which would certainly arouse the suspicions of even a mildly cynical person. The most interesting of these phone transactions are as follows: On November 24, 1983, Alfano placed a ten minute phone call to Sicily, and three minutes later called Evola.[2] On November 29, Alfano called Evola in Michigan in mid-afternoon. That evening, Evola placed a twelve minute call to Alfano,

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[2] With the exception of some calls from Alfano to Mazzurco, which were recorded under authority of a warrant for tapping Mazzurco's phone, it cannot be proved that the persons named here actually spoke. Only telephone records were submitted, showing that a call was placed between two specific telephones.

and later the same night Palazzolo called Alfano; Alfano immediately called Mazzurco and then called Sicily for ten minutes.

On December 4, Palazzolo called Evola, and six minutes later Alfano called Evola, Mazzurco and Palazzolo in rapid succession. That evening Evola called Alfano and spoke for eight minutes, and later that same night Palazzolo and Alfano traded calls. The next afternoon, Alfano called Evola for thirteen minutes. That evening Palazzolo spoke to Alfano for nearly one-half hour and, less than ten minutes later, Alfano called Evola and spoke for nearly ten minutes.

On the morning of December 12, there occurred a flurry of calls among Palazzolo, Alfano and Sicily. That afternoon, Alfano called Evola, and less than ten minutes later, Evola called Alfano and spoke for nearly fifteen minutes. Less than an hour

later, Alfano called Mazzurco. On December 17, Palazzolo called Evola and fifteen minutes later Evola called Palazzolo back and spoke for fifteen minutes. Less than half an hour later, Palazzolo called Joseph Badalamenti in Mastic, New York.

There is also evidence obtained from the circumstances of travel to and from New York in late September 1983 and calls related thereto. Those events began on September 25, with a collect call placed to Alfano's home from the vicinity of the Detroit airport and near Evola's home. The next day, Mazzurco was seen in New York receiving a brown paper bag from a known drug dealer, and then driving Alfano and Palazzolo to rent a car in Palazzolo's name. On the morning of September 27, a collect call was placed to Alfano's home from a phone along with highway from New York to Detroit. Later the same

day, the rental car was returned in Toledo, Ohio. Toledo is not far from Evola's home, but distant from the homes of Alfano and Palazzolo. Two days later, Alfano and Palazzolo were again in New York, and were seen receiving a similar grocery bag from Mazzurco, which they took to a hotel room registered to a Mr. Lupo, alleged to be the alias of Badalamenti's nephew, Vincent Randazzo, a member of the conspiracy. During that same week, two calls were placed from that hotel room to Evola, as well as a call to a Brazilian individual soon arrested in a Brazilian drug raid.

The affidavits for the warrant also indicated that phone calls were made in the summer of 1983 from a pay phone at Pineway Liquor Mart to Evola, to Brazil, and to Sicily at the same numbers used for calls made from Alfano's Pizza during the same time

period. This circumstance, a common counter-surveillance technique, and the use of drug-related code in intercepted discussions between Alfano and Mazzurco are also relevant in assessing probable cause for the warrant.

The question presented is whether these circumstances provide sufficient reasonable, articulable suspicion to meet the probable cause requirements for the issuance of a warrant.

III

The basic standards for a wiretap are similar to those for a search, but there also must be strict compliance with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510-2520. See United States v. Weinrich, 586 F.2d 481, 487 (5th Cir. 1978), cert. denied, 441 U.S. 927

(1979); United States v. Feldman, 535 F.2d 1175 (9th Cir.), cert. denied, 429 U.S. 940 (1976). That Act was enacted for the purpose of regularizing and controlling the issuance of warrants for wiretaps. At the same time, we are instructed that there is no specific formula that must be met for a warrant, and that evidence must be judged on the totality of the circumstances and in a reasonable and common sense manner. Illinois v. Gates, 462 U.S. 213, 238 (1983). Under this standard, the question that must be decided in issuing a warrant is whether there is probable cause to believe that evidence of a crime will be uncovered.

Obviously certainty is not required at this stage, and the exact quantum of support required has frequently been described as "a fair probability," but more than a "mere suspicion," that such evidence will be

discovered. Facts can amount to a fair probability without being proof beyond a reasonable doubt or even a prima facie showing. Id. at 235. Since the issuing judge is in the best position to determine all of the circumstances in the light in which they may appear at the time, "great deference" is normally paid to the determination of an issuing judge. "Reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause, and we have thus concluded that the preference for warrants is most appropriately effectuated by according 'great deference' to a magistrate's determination." United States v. Leon, 468 U.S. 897, 914 (1984)(quoting Spinelli v. United States, 393 U.S. 410, 419 (1969)). Thus, the fact that a later trial judge or reviewing court may feel that a different

conclusion was appropriate does not require, nor even authorize, the suppression of evidence gained through such a warrant. In Lambert v. United States, 771 F.2d 83, 93 (6th Cir.), cert. denied, 474 U.S. 1034 (1985), we held that a magistrate's determination on the question of probable cause will not be reversed if the record contains a "substantial basis for his probable cause findings".

The leading case in our circuit bearing upon a wiretap fact pattern similar to this case is United States v. Algie, 721 F.2d 1039 (6th Cir. 1983)(per curiam). There, we held that there was no probable cause for a warrant when the only facts presented were that a number of calls went from a known bookmaking establishment to the phone on which a tap was sought. Despite a dissent by Judge Krupansky, displaying a clear knowledge

of how a bookmaking business was carried on and how such calls fit into the pattern of such an establishment, the majority held that the evidence did not demonstrate probable cause. However, the opinion in that case emphasized the limited nature of the evidence. Id. at 1043. No return calls were made from the receiving phone. There was never any close connections between the timing of a call and some other event either suspicious in itself or linked directly to the conspiracy or to an illegal act.

In our case, however, there is a recurring pattern of multiple connections among the phone calls, between and among recognized members of the conspiracy, and connected to Evola, the key defendant in this case. The fact that a number of these calls were also made to or from pay phones, a common counter-surveillance technique, and

that some discussions, recorded under other taps not contested here, involved a drug-related code, also adds to the evidence amounting to "a fair probability" that interception of further calls would reveal evidence of a crime.

On at least ten occasions, calls to or from Evola closely followed or preceded calls involving a member of the conspiracy. On two occasions, within fifteen minutes of receiving a call from one of the known members of the conspiracy. Evola placed a call to a known member of the conspiracy. On four occasions, a call to Evola from a member of the conspiracy occurred within sixty minutes of a call between the same person and another member of the conspiracy.

While the defendants hypothesize that all of these calls could have simply involved innocuous family matters, the probable cause

requirement does not require that every contrary hypothesis be excluded. The circumstances need only be such as to provide a person of reasonable caution, as represented by a neutral and detached magistrate, with evidence from which he could find that there was a likelihood that the business of the conspiracy was being furthered. There is probable cause if a "'succession of superficially innocent events ha[s] proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one.'" United States v. Martin, 509 F.2d 1211, 1213 (9th Cir.)(quoting United States v. Patterson, 492 F.2d 995, 997 (9th Cir.), cert. denied, 419 U.S. 846 (1974)), cert. denied, 421 U.S. 967 (1975). The evidence in this case provides ample reason to uphold such a finding. The

material supporting the warrant certainly goes far beyond the evidence found to be insufficient in Algie.

The support for the warrant in this case is comparable to that in United States v. Todisco, 667 F.2d 255 (2nd Cir. 1981), cert. denied, 455 U.S. 906 (1982). In that case, there was past information as to the actual criminal activity by the targets of the taps, but none related to present activities. Thus, the probative information was essentially reduced to visible association with known drug dealers. Id. at 258. In this case, the apparent association was largely invisible, at least to the eyes of the authorities, having been carried out by telephone. This difference does not necessarily alter the quality of the information involved. In particular, the Todisco court noted, the assessment of the

information is largely committed to the issuing magistrate, as the Supreme Court has indicated. Ibid. Thus, neither a trial judge nor an appellate court may exclude evidence gathered under a lawfully issued warrant solely on the basis that those judges would not have issued the warrant had they been in the magistrate's place. Based on the information before us, we would not be according appropriate deference to Chief Judge Feiken's evaluation of the warrant information, were we to hold that the showing was constitutionally insufficient.

IV

The government also attacks a second ground on which the warrant was held to be insufficient.

The Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2518(1)(c), requires a determination that other means of obtaining information, such as physical surveillance, use of informants, and other investigative techniques, would be unsuccessful.[3] Despite the evidence of the close-knit nature of the family group involved in the drug trafficking, and Evola's connection to it, the trial judge rejected the contention that an adequate "needs statement" had been made.

The needs statement provision was placed in the statute to ensure that a wiretap "is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." United States

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[3] This section requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."

v. Kahn, 415 U.S. 143, 153 n.12 (1974) (citation omitted). Thus, wiretaps are not to be used thoughtlessly or in a dragnet fashion. As our court has said, what is needed is to show that wiretaps are not being "'routinely employed as the initial step in criminal investigation.'" United States v. Landmesser, 553 F.2d 17, 20 (6th Cir.) (quoting United States v. Giordano, 416 U.S. 505, 515 (1974)), cert. denied, 434 U.S. 855 (1977). However, the government is not required to prove that every other conceivable method has been tried and failed or that all avenues of investigation have been exhausted. United States v. Brown, 761 F.2d 1272, 1275 (9th Cir. 1985). See S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 2112, 2190.

Our court has summarized this requirement in Lambert, 771 F.2d at 91 (citations omitted), as follows:

> All that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate.

This is precisely what the government did in this case. It indicated the steps that had been taken with regard to other investigative targets, and the difficulties in placing an informant in or maintaining continual surveillance of those involved in far-flung operations, including involvement of a number of members of a close-knit family group. The government thus indicated both the "serious consideration" of other measures and the "reasons" for the belief in their

inadequacy. We believe that the standards contained in the Act do not require proof of the absolute impossibility of all other means. Instead, a reasonable statement of the consideration or use of other investigative means is adequate, and was present in this case. The decision of the district court is REVERSED.

APPENDIX C

No. 85-1845
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff-Appellant,<br><br>vs.<br><br>PIETRO ALFANO, et al.,<br><br>Defendants,<br><br>SALVATORE EVOLA,<br>GIROLAMO VITO PALAZZOLO,<br><br>Defendants-Appellees. | ) | O R D E R |

BEFORE: JONES, MILBURN and BOGGS,
Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this

Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk

APPENDIX D

INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

vs. Criminal No: _____

PIETRO ALFANO,
SALVATORE EVOLA,
a/k/a "Sam", "Turi",
GIROLAMO VITO PALAZZOLO,
and GIROLAMO VITALE,
a/k/a "Nimmo",

VIOLATIONS:
21 U.S.C. 841(a)(1)
and 846

Defendants.
_____/

I N D I C T M E N T

THE GRAND JURY CHARGES:

COUNT ONE

(21 U.S.C. 846 - Conspiracy
to Distribute Cocaine)

That beginning in early 1984 and continuing until on or about April 9, 1984, within the Eastern District of Michigan, and elsewhere, PIETRO ALFANO, SALVATORE EVOLA, also known as "Sam", also known as "Turi", GIROLAMO VITO PALAZZOLO, and GIROLAMO VITALE, also known as "Mimmo", all Defendants herein, did knowingly, intentionally and unlawfully combine, conspire, confederate and agree together and with other persons whose names are both known and unknown to the grand jury, to commit an offense or offenses against the United States, that is, to possess with intent to distribute and to distribute cocaine, a Schedule II Narcotic Drug Controlled Substance in violation of Section 841(a)(1) of Title 21, United States Code.

OVERT ACTS

In furtherance of said unlawful conspiracy, and to affect the objects thereof, the various co-conspirators and Defendants herein, committed the following overt acts:

1. On February 19, 1984, PIETRO ALFANO and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

2. On February 19, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

3. On February 20, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

4. On February 20, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

5. On February 21, 1984, PIETRO ALFANO traveled from Illinois to the Eastern District of Michigan.

6. On February 21, 1984, PIETRO ALFANO, GIROLAMO VITO PALAZZOLO and GIROLAMO VITALE, engaged in a meeting at Detroit Metropolitan Airport.

7. On February 21, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a meeting at Detroit Metropolitan Airport.

8. On February 22, 1984, PIETRO ALFANO and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

9. On February 22, 1984, GIROLAMO VITO PALAZZOLO traveled to the residence of SALVATORE EVOLA and returned to his own residence.

10. On February 22, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

11. On February 27, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

12. On February 28, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

13. On February 29, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

14. On February 29, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

15. On February 29, 1984, PIETRO ALFANO and GIROLAMO VITALE engaged in a telephone conversation.

16. On March 1, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

17. On March 2, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

18. On March 2, 1984, PIETRO ALFANO and GIROLAMO VITALE engaged in a telephone conversation.

19. On March 3, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

20. On March 4, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

21. On March 6, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

22. On March 6, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

23. On March 6, 1984, PIETRO ALFANO and GIROLAMO VITALE engaged in a telephone conversation.

24. On March 7, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

25. On or about March 8, 1984 SALVATORE EVOLA traveled from the Eastern District of Michigan to Illinois.

26. On March 10, 1984, GIROLAMO VITO PALAZZOLO and GIROLAMO VITALE engaged in a meeting.

27. On March 14, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

28. On March 16, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

29. On March 27, 1984, PIETRO ALFANO and GIROLAMO VITALE engaged in a telephone conversation.

30. On March 28, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

31. On March 29, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

32. On March 29, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a telephone conversation.

33. On March 29, 1984, SALVATORE EVOLA and GIROLAMO VITO PALAZZOLO engaged in a meeting in Taylor, Michigan.

34. On March 29, 1984, PIETRO ALFANO and SALVATORE EVOLA engaged in a telephone conversation.

35. On April 9, 1984, SALVATORE EVOLA was in possession of approximately 28 grams of cocaine.

36. On April 9, 1984, GIROLAMO VITALE was in possession of approximately 222 grams of cocaine.

All in violation of Title 21, United States Code, Section 846.

COUNT TWO
(21 U.S.C. 841(a)(1) - Possession with Intent to Distribute Cocaine)

That on or about April 9, 1984, within the Eastern District of Michigan, SALVATORE EVOLA, Defendant herein, did knowingly,

willfully and unlawfully possess with intent to distribute approximately 28 grams of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT THREE
(21 U.S.C. 841(a)(1) - Possession with Intent to Distribute Cocaine)

That on or about April 9, 1984, within the Eastern District of Michigan, GIROLAMO VITALE, Defendant herein, did knowingly, willfully and unlawfully possess with intent to distribute approximately 222 grams of cocaine, a Schedule II Narcotic Drug Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1).

All in violation of Title 21, United States Code, Section 841(a)(1).

THIS IS A TRUE BILL.

_____

FOREPERSON

_____

LEONARD R. GILMAN
United States Attorney
Eastern District of Michigan

_____

MICHAEL R. MUELLER
Assistant United States Attorney
Detroit Strike Force
940 Federal Building
Detroit, Michigan 48226
Telephone: 313-226-7252

Dated: _____

# APPENDIX E

## TEXT OF STATUTES INVOLVED

### 18 United States Code §2510(11)

Definitions -- As used in this Chapter --
(11) "aggrieved person" means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.

### 18 United States Code §2518(1)(a-f)

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state that applicant's authority to make such application. Each application shall include the following information:

(a) Identity of the investigative or law enforcement officer making application, and the officer authorizing the application;

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that in order should be issued including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the

place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) A full and complete statement as to whether or not other investigative procedures have been tried and failed and why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) A statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communication of the same type will occur thereafter;

(e) A full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) Where the application is for an extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

18 United States Code §2518(8)(a)

The contents of any wire, oral or electronic communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. Recording of the contents of any wire, oral or electronic communication under this subsection shall be done in such a way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsection (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire, oral, or electronic communication or evidence derived therefrom under subsection (3) of section 2517.

18 United States Code §2518(10)(a)

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter, for evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person for his counsel for inspection such portions of the intercepted communication of evidence derived therefrom as the judge determines to be in the interests of justice.

18 United States Code §3731

Appeal by United States.

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict of judgment, as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes.

21 United States Code §841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -- to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 United States Code §846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

Miscellaneous No: 84-153

/

ORDER AUTHORIZING
INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation

Application under oath having been made before me by Michael R. Mueller, Special Attorney, United States Department of Justice, Detroit, Michigan and an "investigative or law enforcement officer" as defined in Section 2510(7), of Title 18, United States Code, for an order authorizing the interception of wire communications

pursuant to Section 2518, Title 18, United States Code, and the court having considered the application and affidavit submitted in support thereof, and premised upon the said application and affidavit in support, the court finds:

A. There is probable cause to believe that Samuel Evola, Pietro Alfano, Emanuele Palazzolo, and others specifically referred to in the appendices to the affidavit in support of this order and others as yet unknown, have committed and are committing offenses enumerated in Section 2516, Title 18, United States Code, that is, offenses involving the distribution and possession with intent to distribute controlled substances, in violation of Title 21, United States Code, Section 841(a)(1), offenses involving the use of communication facilities to commit or facilitate controlled substance violations in violation of Title 21, United

States Code, Section 843(b), offenses involving a continuing criminal enterprise in violation of Title 21, United States Code, Section 848, conspiracy to commit the above described offenses in violation of Title 21, United States Code, Section 846, offenses involving the importation of controlled substances in violation of Title 21, United States Code, Sections 952 and 960, and conspiracy to commit these last mentioned offenses in violation of Title 21, United States Code, Section 963.

B. There is probable cause to believe that evidence of the commission of the above described offenses by Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Salvatore Mazzurco, and others specifically referred to in the appendices to the affidavit in support of this order and others as yet unknown, will be obtained through the interception, authorization for which has been requested,

which will include but will not be limited to discussion of the ways and means of importation and distribution of controlled substances, the names of other members of the conspiracy, telephone numbers of other telephone facilities used in the conspiracy, and the precise nature and full scope of the criminal conduct involved.

C. Normal investigative procedures either have been tried without success, reasonably appear unlikely to succeed if continued, reasonably appear unlikely to succeed if tried, or reasonably appear to be too dangerous for specific reasons more fully set forth in the affidavit filed in pursuit of this order.

D. There is probable cause to believe that the telephone facilities bearing telephone number (313) 856-3718, located at and subscribed to by Samuel Evola, 9870 Crabb, Temperance, Michigan, has been and is

being used by Samuel Evola, Pietro Alfano, Emanuele Palazzolo, and others as yet unknown, in connection with the offenses described in paragraph B, supra.

WHEREFORE, IT IS HEREBY ORDERED that special agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized pursuant to Application authorized by the Assistant Attorney General of the Criminal Division, the Honorable Stephen S. Trott, who has been specially designated by the Attorney General of the United States to exercise the power conferred on him by Section 2516 of Title 18, United States Code:

> to intercept wire communications of Samuel Evola, Pietro Alfano, Emanuele Palazzolo, and others as yet unknown, concerning the above-described offenses to and from the telephone facilitate bearing

telephone number (313) 856-3718 located at and subscribed to by Samuel Evola, 9870 Crabb, Temperance, Michigan.

Such interceptions shall not automatically terminate when the type of communication described in paragraph B, supra, has first been obtained, but shall continue until communications are intercepted which reveal the mode, manner, and method with which Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Salvatore Mazzurco, and others specifically referred to in the appendices to the affidavit in support of this order, and others as yet unknown, operate and conduct the offenses described above and which reveal the identities of confederates and the precise nature and full extent of the criminal conduct involved

therein, or for a period up to and including thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER ORDERED upon request of the applicant that All-Tel Michigan, Inc., formerly Mid-Michigan Telephone Company, Stockbridge, Michigan, and Michigan Bell Telephone Company, communication common carriers as defined in Section 2510(10) of Title 18, United States Code, shall forthwith furnish to the applicant all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the person whose communications are to be intercepted, the furnishing of such facilities or technical assistance by All-Tel Michigan, Inc., formerly the Mid-Michigan

Telephone Company, and Michigan Bell Telephone Company to be compensated by the applicant at the prevailing rate.

Providing that this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective or, in any event, up to and including thirty (30) days from the date of this order.

Providing further that, voice identification techniques and/or physical surveillance is to be employed whenever practicable in order to facilitate the minimization of interceptions of

communications of individuals not otherwise subject to interception under the within order.

Providing also, that the applicant or another government attorney shall provide the court with a report on or about the tenth and twentieth days following the date of this order indicating what progress has been made towards achievement of the authorized objective and the need for continued interception.

/s/ JOHN FEIKENS
UNITED STATES DISTRICT COURT JUDGE

Dated: February 3, 1984

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

Miscellaneous No: 3-1-84 JF

/

ORDER

This matter having come before the Court pursuant to the application of the United States for the interception of wire communications on telephone number (313) 247-2355, located at and subscribed to by Girolamo Vito Palazzolo, 14049 Lakeshore, Sterling Heights, Michigan, and on telephone number (313) 752-5301, located at and subscribed to by Romeo Car Wash, 115 Lafayette Street, Washington Township,

Michigan, mailing address Romeo Car Wash, 14049 Lakeshore, Sterling Heights, Michigan, the residence of Girolamo Vito Palazzolo.

IT APPEARING that the Court, having reviewed the application and having found that it conforms in all respects to the requirements of Title 18, United States Code, Sections 2516 and 2518, has this 1st day of March, 1984, signed an Order conforming to the provisions of Title 18, United States Code, Section 2518, authorizing special agents of the Federal Bureau of Investigation to accomplish the aforesaid interception; and

IT FURTHER APPEARING that the Michigan Bell Telephone Company is a communication common carrier within the meaning of Title 18, United States Code, Section 2510(10); and

IT FURTHER APPEARING that the applicant has requested that the Michigan Bell Telephone Company, be directed to furnish the applicant forthwith all information,

facilities, and technical assistance necessary to accomplish this interception unobtrusively and with minimum interference to the service to be intercepted;

It is by the Court this 1st day of March 1984,

ORDERED THAT the Michigan Bell Telephone Company shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service presently accorded persons whose communications are to be intercepted, and

FURTHER ORDERED that the furnishing of any such facilities or technical assistance by the Michigan Bell Telephone Company be compensated by the applicant at the prevailing rates, and

FURTHER ORDERED that the furnishing of said information, facilities and technical assistance shall terminate thirty (30) days from the date of this Order unless otherwise ordered by this Court, and

FURTHER ORDERED that this Order is sealed and that the Michigan Bell Telephone Company, its agents, and its employees shall not disclose to the listed subscribers for the said telephone numbers, or to any other person, the existence of the orders or this investigation until otherwise ordered by the court.

/s/ JOHN FEIKENS
HONORABLE JOHN FEIKENS
United States District Court Judge

DATED: 3/1/84

AT: 4:32 p.m. o'clock

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

Miscellaneous No: 3-3-84 JF

/

O R D E R

This matter having come before the Court pursuant to the application of the United States for the interception of wire communications on telephone number (313) 856-3718, located at and subscribed to by Samuel Evola, 9870 Crabb, Temperance, Michigan, and

IT APPEARING that the Court, having reviewed the application and having found that it conforms in all respects to the requirements of Title 18, United States Code,

Sections 2516 and 2518, has this 3rd day of March, 1984, signed an Order conforming to the provisions of Title 18, United States Code, Section 2518, authorizing special agents of the Federal Bureau of Investigation to accomplish the aforesaid interception; and

IT FURTHER APPEARING that All-Tel Michigan, Inc., formerly the Mid-Michigan Telephone Company, and the Michigan Bell Telephone Company are communication common carriers within the meaning of Title 18, United States Code, Section 2510(10); and

IT FURTHER APPEARING that the applicant has requested that All-Tel Michigan, Inc., formerly the Mid-Michigan Telephone Company, and Michigan Bell Telephone Company, be directed to furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish this

interception unobtrusively and with minimum interference to the service to be intercepted;

It is by the Court this 3rd day of March 1984,

ORDERED THAT All-Tel Michigan, Inc., formerly the Mid-Michigan Telephone Company, and the Michigan Bell Telephone Company shall furnish the Federal Bureau of Investigation such information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the service presently accorded persons whose communications are to be intercepted, and

FURTHER ORDERED that the furnishing of any such facilities or technical assistance by the All-Tel Michigan, Inc., formerly the Mid-Michigan Telephone Company, and Michigan Bell Telephone Company be compensated by the applicant at the prevailing rates, and

FURTHER ORDERED that the furnishing of said information, facilities and technical assistance shall terminate thirty (30) days from the date of this Order unless otherwise ordered by this Court, and

FURTHER ORDERED that this Order is sealed and that All-Tel Michigan, Inc., formerly the Mid-Michigan Telephone Company, and Michigan Bell Telephone Company, their agents, and their employees shall not disclose to the listed subscribers for the said telephone numbers, or to any other person, the existence of the orders or this investigation until otherwise ordered by the court.

/s/ JOHN FEIKENS
HONORABLE JOHN FEIKENS
United States District Court Judge

DATED: 3/3/84

AT: 9:25 a.m. o'clock

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

---

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

Miscellaneous No: 3-31-84 JF

/

ORDER AUTHORIZING THE CONTINUED INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation

Application under oath having been made before me by Michael R. Mueller, Special Attorney, United States Department of Justice, Detroit, Michigan and an "investigative or law enforcement officer" as defined in Section 2510(7), of Title 18, United States Code, for an order authorizing the continued interception of wire

communications pursuant to Section 2518, Title 18, United States Code, and the court having considered the application and affidavit submitted in support thereof, and premised upon the said application and affidavit in support, the court finds:

A. There is probable cause to believe that Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Salvatore Mazzurco, Christina Evola, Cesare Pizzo, Philip Palazzolo, also known as Filipo Palazzolo, Girolamo Vito Palazzolo, and others specifically referred to in the appendix to the affidavit in support of the application for this order, and others as yet unknown, have committed and are committing offenses enumerated in Section 2516, Title 18, United States Code, that is, offenses involving the distribution and possession with intent to distribute controlled substances, in violation of Title 21, United States Code, Section 841(a)(1),

offenses involving the use of communication facilities to commit or facilitate controlled substance violations in violation of Title 21, United States Code, Section 843(b), offenses involving a continuing criminal enterprise in violation of Title 21, United States Code, Section 848, conspiracy to commit the above-described offenses in violation of Title 21, United States Code, Section 846, offenses involving the importation of controlled substances in violation of Title 21, United States Code, Sections 952 and 960, and conspiracy to commit these last mentioned offenses in violation of Title 21, United States Code, Section 963.

B. There is probable cause to believe that evidence of the commission of the above-described offenses by Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Salvatore Mazzurco, Christina Evola, Cesare Pizzo,

Philip Palazzolo, also known as Filipo Palazzolo, Girolamo Vito Palazzolo, and others specifically referred to in the appendix to the affidavit in support of the application for this order, and others as yet unknown, will be obtained through the interception, authorization for which has been requested, which will include but will not be limited to discussion of the ways and means of importation and distribution of controlled substances, the names of other members of the conspiracy, telephone numbers of other telephone facilities used in the conspiracy, and the precise nature and full scope of the criminal conduct involved.

C. Normal investigative procedures either have been tried without success, reasonably appear unlikely to succeed if continued, reasonably appear unlikely to succeed if tried, or reasonably appear to be

too dangerous for specific reasons more fully set forth in the affidavit filed in pursuit of this order.

D. There is probable cause to believe that the telephone bearing telephone number (313) 856-3718, located at and subscribed to by Samuel Evola, 9870 Crabb, Temperance, Michigan, has been and is being used by Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Christina Evola, Cesare Pizzo, Philip Palazzolo, also known as Filipo Palazzolo, Girolamo Vito Palazzolo, and others as yet unknown, in connection with the offenses described in paragraph A, supra, and that the telephone bearing telephone number (313) 247-2355, located at and subscribed to by Girolamo Vito Palazzolo, 14049 Lakeshore, Sterling Heights, Michigan, and the telephone bearing telephone number (313) 752-5301, located at and subscribed to by Romeo Car Wash, 115 Lafayette Boulevard, Washington

Township, Michigan, mailing address Romeo Car Wash, 14049 Lakeshore, Sterling Heights, Michigan, the residence of Girolamo Vito Palazzolo, have been and are being used by Samuel Evola, Pietro Alfano, Girolamo Vito Palazzolo, Christina Evola, Philip Palazzolo, also known as Filipo Palazzolo, and others as yet unknown, in connection with the offenses described in paragraph A, supra.

WHEREFORE, IT IS HEREBY ORDERED that special agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized pursuant to Application authorized by the Assistant Attorney General of the Criminal Division, the Honorable Stephen S. Trott, who has been specially designated by the Attorney General of the United States to exercise the power conferred on him by Section 2516 of Title 18, United States Code:

to intercept wire communications of Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Christina Evola, Cesare Pizzo, Philip Palazzolo, also known as Filipo Palazzolo, Girolamo Vito Palazzolo, and others as yet unknown, concerning the above-described offenses to and from the telephone facilities bearing telephone number (313) 856-3718 located at and subscribed to by Samuel Evola, 9870 Crabb, Temperance, Michigan, and to intercept wire communications of Samuel Evola, Pietro Alfano, Girolamo Vito Palazzolo, Christina Evola, Philip Palazzolo, also known as Filipo Palazzolo, and others as yet unknown, concerning the above-described offenses to and from the telephone facilities bearing

telephone number (313) 247-2355 located at and subscribed to by Girolamo Vito Palazzolo, 14049 Lakeshore, Sterling Heights, Michigan and to and from the telephone facilities bearing telephone number (313) 752-5301, located at and subscribed to by Romeo Car Wash, 115 Lafayette Boulevard, Washington Township, Michigan, mailing address Romeo Car Wash, 14049 Lakeshore, Sterling Heights, Michigan, the residence of Girolamo Vito Palazzolo.

Should the need arise requiring the assistance of Italian speaking individuals, special agents of the Federal Bureau of Investigation, United States Department of Justice, responsible for the monitoring and recording, are further authorized to consult with members of the Italian National Police

to interpret colloquialism, slang, dialect, and other language the meaning of which is not readily apparent.

Such interceptions shall not automatically terminate when the type of communication described in paragraph B, supra, has first been obtained, but shall continue until communications are intercepted which reveal the mode, manner, and method with which Samuel Evola, Pietro Alfano, Emanuele Palazzolo, Salvatore Mazzurco, Christina Evola, Cesare Pizzo, Philip Palazzolo, also known as Filipo Palazzolo, Girolamo Vito Palazzolo, and others specifically referred to in the appendix to the affidavit in support of the application for this order, and others as yet unknown, operate and conduct the offenses described above and which reveal the identities of confederates and the precise nature and full extent of the criminal conduct involved

therein, or for a period up to and including thirty (30) days from the date of this order, whichever is earlier.

IT IS FURTHER ORDERED upon request of the applicant that All-Tel Michigan, Inc., formerly Mid-Michigan Telephone Company, Stockbridge, Michigan, and Michigan Bell Telephone Company, communication common carriers as defined in Section 2510(10) of Title 18, United States Code, shall forthwith furnish to the applicant all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted, the furnishing of such facilities or technical assistance by All-Tel Michigan, Inc., formerly the Mid-Michigan

Telephone Company, and Michigan Bell Telephone Company to be compensated by the applicant at the prevailing rate.

Providing that this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective or, in any event, up to and including thirty (30) days from the date of this order.

Providing further that, voice identification techniques and/or physical surveillance is to be employed whenever practicable in order to facilitate the minimization of interceptions of

communications of individuals not otherwise subject to interception under the within order.

Providing also, that the applicant or another government attorney shall provide the court with a report on or about the tenth and twentieth days following the date of this order indicating what progress has been made towards achievement of the authorized objective and the need for continued interception.

/s/ JOHN FEIKENS
UNITED STATES DISTRICT COURT JUDGE

Dated: March 31, 1984

Supreme Court, U.S.
FILED
JUN 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1935

# In the Supreme Court of the United States

OCTOBER TERM, 1987

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GIROLAMO VITO PALAZZOLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1935

GIROLAMO VITO PALAZZOLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence recorded telephone conversations that were seized pursuant to court order.

1. On April 30, 1984, petitioner was charged together with three co-defendants in one count of a three-count indictment returned in the United States District Court for the Eastern District of Michigan. The indictment charged petitioner with conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. Two of his co-defendants were also charged separately with possession with intent to distribute cocaine, in violation of 21 U.S.C. 841(a)(1). Before trial, petitioner and his co-defendants moved to suppress the evidence that was derived from court-authorized electronic surveillance of various telephones (Pet. App. A10, A62, A74).

On September 13, 1985, the district court granted the motion in part, finding that the affidavit in support of the

electronic surveillance order did not contain probable cause to support the wiretap of co-defendant Salvatore Evola's telephone and that the wiretaps of petitioner's telephones were tainted by the Evola wiretap (Pet. App. A10-A44, A62-A74). The district court also found that the affidavit for the Evola wiretap did not meet the necessity requirement of 18 U.S.C. 2518(1)(c), because it failed to show that other investigative techniques would be unsuccessful (Pet. App. A44-A58).

The court of appeals reversed, holding that the electronic surveillance order complied with the requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2518 (Pet. App. A92-A114). Relying on the totality of circumstances test of *Illinois* v. *Gates*, 462 U.S. 213 (1983), the court of appeals concluded that the warrant was supported by probable cause. The court also ruled that the affidavit for the warrant contained an adequate statement of the reasons why resort to electronic surveillance was necessary.

2. Petitioner contends (Pet. 13-21) that the court of appeals used an erroneous standard in finding probable cause. He claims that an electronic surveillance order issued under 18 U.S.C. 2518 must satisfy the standard of *Aguilar* v. *Texas*, 378 U.S. 108 (1964), rather than the test of *Illinois* v. *Gates*, *supra*. Petitioner also contends (Pet. 21-26) that the affidavit in this case merely used boilerplate language and therefore failed to fulfill the "necessity" requirement set forth in 18 U.S.C. 2518(1)(c).

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and

his conviction is affirmed on appeal, he will then be able to present his current contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of the final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

JUNE 1988

* Because this case is interlocutory, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60525